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MATTER OF NAULU

In Deportation Proceedings

A-23122658

Decided by Board January 30, 1986

A derivative beneficiary "accompanying or following to join" a principal alien under section 203(a)(8) of the Immigration and Nationality Act, 8 U.S.C. § 1153(a)(8) (1982), cannot precede the principal alien to the United States as an immigrant; however, once the principal alien acquires permanent resident status, his spouse or child is not barred as a matter of law from adjustment of status under section 245 of the Act, 8 U.S.C. § 1255 (1982), by reason of having preceded the principal alien to this country as a nonimmigrant. Matter of Khan, 14 I&N Dec. 122 (BIA 1972), aff'd sub nom. Santiago v. INS, 526 F.2d 488 (9th Cir. 1975), cert. denied, 425 U.S. 971 (1976), distinguished.

CHARGE:

Order: Act of 1952 - Sec. 241(a)(2) [8 U.S.C. § 1251(a)(2)] - Nonimmigrant - remained longer than permitted

ON BEHALF OF RESPONDENT:
Bienvenido D. Junasa
Accredited Representative
State Immigrant Services Center
2153 N. King Street, Suite 304
Honolulu, Hawaii 96819

ON BEHALF OF SERVICE:
Joanna London
General Attorney

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

On September 28, 1983, an immigration judge found the respondent deportable as charged under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2) (1982), as a nonimmigrant who remained in this country longer than permitted, but granted her the privilege of voluntary departure in lieu of deportation. No appeal was taken from that decision. On March 12, 1984, the respondent filed a motion to reopen the proceedings for consideration of her application for adjustment of status under section 245 of the Act, 8 U.S.C. § 1255 (1982). An immigration judge denied the motion on July 19, 1984. The respondent has appealed from the denial of her motion to reopen.

The respondent, a 39-year-old married woman, a native and citizen of Tonga, was admitted to the United States as a nonimmigrant visitor on July 15, 1975, and was authorized to remain in this country until January 15, 1976. She has not departed.

The respondent claims eligibility for adjustment of status as a derivative beneficiary through her husband as provided by section 203(a)(8) of the Act, 8 U.S.C. § 1153(a)(8) (1982). Under section 203(a)(8) of the Act, a spouse or child who is not otherwise entitled to an immigrant status or the immediate issuance of an immigrant visa is entitled to the same preference and the same priority date or order of consideration as the principal alien, without the approval of a separate visa petition, if "accompanying or following to join" his spouse or parent. 1/ See 8 C.F.R. § 204.1(a)(4) (1985). The respondent's husband, whom she married in February 1973, was lawfully admitted to the United States for permanent residence on February 9, 1984.

In a brief in opposition to the motion to reopen, the Immigration and Naturalization Service contended that the respondent is not eligible to adjust her status as a derivative beneficiary since she neither accompanied her husband when he was admitted to

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1/ The relationship between the principal alien and the derivative beneficiary must exist before the principal alien gains permanent resident status as well as at the time the derivative beneficiary seeks entry as an immigrant or adjustment of status. Vol. 9, Foreign Affairs Manual, Part III, 22 C.F.R. § 42.1, note 5. A child or spouse of an alien who is classified as an immediate relative is not eligible for benefits under section 203(a)(8) and must file a separate visa petition. 8 C.F.R. § 204.1(a)(4) (1985).

the United States as an immigrant, nor followed to join him, but she instead preceded him to this country. An alien who precedes the principal alien to the United States, the Service argued, cannot obtain derivative preference status through that principal alien. In support of that proposition, the Service cited State Department regulation 22 C.F.R. § 42.1 (1985) and our decision in Matter of Khan, 14 I&N Dec. 122 (BIA 1972), aff'd sub nom. Santiago v. INS, 526 F.2d 488 (9th Cir. 1975), cert. denied 425 U.S. 971 (1976). Defining the term "accompanying" and "accompanied by," the foregoing regulation, to which the Board referred in Matter of Khan, supra, concludes with the statement, "An 'accompanying' relative may not precede the principal alien to the United States." The immigration judge denied the motion to reopen for the reasons set forth in the Service's brief.

On November 4, 1985, the Board asked the Service to review its position in the respondent's case in light of a policy memorandum, which the Acting Associate Commissioner for Examinations addressed to all Regional Commissioners on July 25, 1985, regarding the eligibility of derivative beneficiaries to apply for adjustment of status when the principal alien has already gained permanent resident status. That memorandum states, inter alia, that an accompanying alien cannot precede the principal alien to the United States "as an immigrant." (Emphasis supplied.) The memorandum specifies that there is no bar to adjustment where, as here, a derivative beneficiary enters the United States as a nonimmigrant before the principal alien acquires permanent resident status.

The memorandum thus makes clear that the right of a derivative beneficiary to permanent resident status is wholly dependent upon that of the principal alien and may not be exercised unless and until the principal alien becomes a permanent resident. However, once the principal alien gains permanent residence, his spouse or child is not precluded as a matter of law from adjusting status as a person "accompanying or following to join" by reason of having physically preceded the principal alien to this country as a nonimmigrant.

We note that the current Service position is not inconsistent with our holding in Matter of Khan, supra. In that case and in the other cases considered by the United States Court of Appeals for the Ninth Circuit in Santiago v. INS, supra, an alien who had been issued an immigrant visa as one "accompanying or following to join" his spouse or parent was erroneously admitted to the United States for permanent residence in advance of the principal alien. In each case, death or the expiration of her visa prevented the principal alien from joining the derivative beneficiary. It was consequently found that the derivative beneficiary was not in possession of a valid immigrant visa at the time of his entry.

Following the Associate Commissioner's policy memorandum, the Service has advised the Board upon reconsideration that the respondent qualifies as a person "accompanying or following to join" for purposes of adjustment of status. As the respondent has made a prima facie showing of eligibility for the relief sought under section 245 of the Act, we shall sustain the appeal, grant the motion to reopen, and remand the record to the immigration judge for consideration of the respondent's application for adjustment of status.

ORDER: The appeal is sustained. The proceedings are reopened and the record is remanded to the immigration judge for consideration of the respondent's application for adjustment of status pursuant to section 245 of the Act.

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MATTER OF VALENCIA

In Deportation Proceedings

A-24305559

Decided by Board February 14, 1986

Where the respondent presented a generalized statement on the Notice of Appeal (Form I-290A), failed to express the specific rational for his conclusory assertions, filed no separate written brief, and did not seek oral argument to further explain the alleged error, his appeal is summarily dismissed pursuant to 8 C.F.R. § 3.1(d)(1-a)(i) (1985) for failure to adequately specify the reasons for the appeal.

CHARGE:

Order: Act of 1952 - Sec. 241(a)(2) [8 U.S.C. § 1251(a)(2)] - Nonimmigrant - remained longer than permitted

ON BEHALF OF RESPONDENT:
Louis Serterides, Esquire
152 Central Avenue
Jersey City, New Jersey 07306

ON BEHALF OF SERVICE:
Teresita R. Guerrero
General Attorney

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

In a decision dated September 25, 1985, the immigration judge found the respondent deportable on his own admissions under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2) (1982), as a nonimmigrant crewman who remained longer than permitted, and granted him voluntary departure in lieu of deportation. The respondent has appealed from that decision. The appeal will be summarily dismissed pursuant to 8 C.F.R. § 3.1(d)(1-a)(i) (1985).

On his Notice of Appeal (Form I-290A), the respondent, through counsel, states the following as his reason for this appeal: "I respectfully submit that the hearing officer erred in that of the appellant [sic] burden of proving a well-founded fear of persecution in his native Nicaragua." The respondent also specified on the Notice of Appeal that he does not desire oral argument and that he is not filing a separate written brief in support of his appeal.

We are unable to determine from the respondent's stated reason for his appeal whether the error he alleges relates to the particular facts of his case, the law applied to them by the immigration judge, or both. By presenting only a generalized statement without filing a supporting brief to explain the specific aspects of the immigration judge's order that the respondent considers to be incorrect, he has failed to meaningfully identify the reasons for taking an appeal. In order to review the appeal, it would therefore be necessary for the Board to search through the record and speculate on what possible errors the respondent claims.

The regulations provide for summary dismissal of an appeal where the party concerned fails to specify the reasons for the appeal. 8 C.F.R. § 3.1(d)(1-a)(i) (1985). In Matter of Holguin, 13 I&N Dec. 423 (BIA 1969), we noted that this regulation was designed to permit us to deal promptly with appeals where the reasons given for the appeal are inadequate to apprise the Board of the particular basis for the alien's claim that the immigration judge's decision is wrong. We find that the respondent's appeal is one which warrants summary dismissal for failure to state with specificity the grounds for taking the appeal. See Reyes-Mendoza v. INS, 774 F.2d 1364 (9th Cir. 1985).

It is essential to the Board's adjudication of an appeal that the reasons given on the Notice of Appeal be as detailed as possible so that the alleged error can be identified and addressed. Without a specific statement, the Board can only guess at how the alien disagrees with the immigration judge's decision. It is therefore insufficient to merely assert that the immigration judge improperly found that deportability had been established or denied an application for relief from deportation. See Reyes-Mendoza v. INS, supra. Where eligibility for discretionary relief is at issue, it should be stated whether the error relates to grounds of statutory eligibility or to the exercise of discretion. Furthermore, it should be clear whether the alleged impropriety in the decision lies with the immigration judge's interpretation of the facts or his application of legal standards. Where a question of law is presented, supporting authority should be included, and where the dispute is on the facts, there should be a discussion of the particular details contested.

Although the regulations only refer to the reasons that must be stated on the Notice of Appeal, the contentions made by an alien on appeal are of course best presented in a brief setting forth his arguments. Depending on the complexity of the issues raised, a brief may be essential to an adequate presentation of the appeal. In all cases, however, the reasons for an appeal must be meaningfully identified on the Notice of Appeal.

The respondent has stated only that the immigration judge erred in finding no well-founded fear of persecution. He has chosen not to submit a brief to enlighten us as to the specific rationale for his conclusory assertions and did not request an opportunity for oral argument. Under these circumstances, we find that summary dismissal of the appeal is appropriate. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

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MATTER OF CARBALLE

In Exclusion Proceedings

A-22788430

Decided by Board February 13, 1986

(1) An alien is barred from the relief of withholding of deportation if he, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States. See section 243(h)(2)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(2)(B) (1982).

(2) Once a finding is made that an alien has been finally convicted of a particularly serious crime, it necessarily follows that the alien is a danger to the community of the United States.

(3) Because the proper focus is on the serious nature of the crime and not on the likelihood of future serious misconduct on the part of the alien, the contention that the statute requires two separate and distinct findings as to "seriousness of the crime" and "danger to the community" is rejected.

(4) If an applicant is statutorily ineligible for withholding of deportation because he is a danger to the community of the United States, having been finally convicted of an inherently particularly serious crime, e.g., armed robbery, background evidence including the circumstances of the crime is not relevant to the determination of statutory eligibility.

EXCLUDABLE:
Act of 1952 - Sec. 212(a)(9) [8 U.S.C. § 1182(a)(9)] - Crime involving moral turpitude

Act of 1952 - Sec. 212(a)(20) [8 U.S.C. § 1182(a)(20)] - No valid immigrant visa

ON BEHALF OF APPLICANT:
Robert L. Boyer, Esquire
623 West Flagler Street
Miami, Florida 33130

ON BEHALF OF SERVICE:
David Dixon
Appellate Counsel

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

In a decision dated February 6, 1985, the immigration judge found the applicant excludable on the grounds set forth above, denied his applications for asylum and withholding of deportation under sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1253(h) (1982), and ordered that he be excluded and deported from the United States. 1/ The applicant appeals the denial of asylum and withholding of deportation. The appeal will be dismissed.

The applicant is a 22-year-old native and citizen of Cuba. After departing Cuba and arriving at Key West, Florida, in April 1980 as part of the Mariel boatlift, the applicant was paroled into the United States.

On February 18, 1983, in the Circuit Court for Dade County, Florida, the applicant was convicted, on his plea of guilty, of (1) robbery with a firearm, to wit, a pistol (two counts), (2) attempted robbery with a firearm, to wit, a pistol (two counts), (3) grand theft second degree, and (4) accessory after the fact, in violation of sections 812.13, 812.014, and 777.03 of the Florida Statutes. The applicant was sentenced to terms of 15 years each on the robbery and attempted robbery counts with the sentences to run concurrently. He also was sentenced to terms

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1/ In his decision, the immigration judge refers to the applicant as Lazarro Caraballe. Inasmuch as there is no issue regarding the applicant's identity, we find that the reference is an inadvertent error and that the decision does, in fact, relate to the applicant. *See* *Corona-Palomera* v. *INS*, 661 F.2d 814 (9th Cir. 1981); *United States* v. *Rebon-Delgado*, 467 F.2d 11 (9th Cir. 1972); *Valeros* v. *INS*, 387 F.2d 921 (7th Cir. 1967); *Vlisidis* v. *Holland*, 245 F.2d 812 (3d Cir. 1957); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

of 5 years each on the grand theft and accessory counts with the sentences to run concurrently with the robbery counts. He was incarcerated at the time of the exclusion hearing.

At his hearing, the applicant, through counsel, conceded excludability under section 212(a)(20) of the Act, 8 U.S.C. § 1182(a)(20) (1982), and did not contest excludability under section 212(a)(9) of the Act. He requested asylum and withholding of deportation. The applicant submitted that he would be imprisoned and singled out for disparate treatment by Cuban authorities because he was one of the first Cubans to enter the Peruvian Embassy in Havana in 1980. The record includes a "Safe Conduct Definitive," issued by the Cuban Government, which essentially authorized the applicant's safe conduct from the Peruvian Embassy to any country that offered him a visa. Also, the applicant stated that he would be persecuted in Cuba because of his robbery convictions in the United States.

The immigration judge denied the applicant's applications for asylum and withholding of deportation without reaching the merits of the claim or submitting any documents to the State Department for an advisory opinion. See 8 C.F.R. § 208.10(b) (1985). In view of the nature of the offenses that had been committed, the immigration judge found that the applicant was ineligible for relief under section 243(h) of the Act as one who had been convicted of a particularly serious crime and constituted a danger to the community of the United States. For the same reason, the immigration judge denied asylum.

In pertinent part, section 243(h)(2)(B) of the Act provides that withholding of deportation "shall not apply to any alien if the Attorney General determines that the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States."

On appeal, the applicant contends that the immigration judge erred in his interpretation of section 243(h)(2)(B) of the Act. Through counsel, he submits that section 243(h)(2)(B) requires two separate factual findings. First, it must be determined that an applicant has committed a particularly serious crime. Then, there must be a second, distinct finding that the applicant constitutes a danger to the community of the United States. The applicant submits that "the use of the present tense verb 'constitutes' in section 243(h)(2)(B) indicates that this second question should be appraised in light of present circumstances and the record should therefore be carefully scrutinized for evidence of rehabilitation or other factors indicating that [the] applicant may not now be a danger to the community."

The Service, however, argues that both the language of section 243(h)(2)(B) of the Act and its legislative history make clear that only one test is required. It is submitted that section 243(h)(2)(B) "establishes a cause and effect relationship between the two clauses." If Congress had "intended to establish two separate criteria," the Service argues, "it could have easily done so by its use of the conjunction 'and.' Instead, the grammatical structure shows that a conviction for a particularly serious crime is the sole factor which Congress has made determinative of whether the alien constitutes a danger to the community."

The Service contends that the legislative history of this statutory provision supports the contention that only one finding is required. The present provisions of section 243(h) of the Act were enacted as part of the Refugee Act of 1980. The House Judiciary Committee Report, in reviewing the provisions of section 243(h), noted that an exception to eligibility for such relief included "aliens . . . who have been convicted of particularly serious crimes which make them a danger to the community of the United States." (Emphasis added.) 2/ The Service submits that this language reflects the congressional understanding of how section 243(h)(2)(B) is properly read. The phrase "danger to the community" is an aid to defining a "particularly serious crime," not a mandate that administrative agencies or the courts determine whether an alien will become a recidivist.

We find section 243(h)(2)(B) of the Act does not require that two separate and distinct factual findings be made in order to render an alien ineligible for withholding of deportation. It must be determined that an applicant for relief constitutes a danger to the community of the United States to come within the

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2/ H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979).

purview of section 243(h)(2)(B). However, the statute provides the key for determining whether an alien constitutes such a danger. That is, those aliens who have been finally convicted of particularly serious crimes are presumptively dangers to this country's community. The clauses of section 243(h)(2)(B), nevertheless, are inextricably related. We have noted that the phrase "particularly serious crime" is not defined in the statute. Matter of Frentescu, 18 I&N Dec. 244, 246 (BIA 1982). In determining whether a conviction is for such a crime, the essential key is whether the nature of the crime is one which indicates that the alien poses a danger to the community. As we noted in Matter of Frentescu, id., there are some crimes that are inherently "particularly serious" while others clearly are not. There will be cases, however, where the seriousness of a crime will have to be judged by considering the nature of the conviction, the circumstances and underlying facts of the conviction, the sentence imposed, and whether the type and circumstances of the crime indicate the alien will be a danger to the community. The focus here is on the crime that was committed. If it is determined that the crime was a "particularly serious" one, the question of whether the alien is a danger to the community of the United States is answered in the affirmative. We do not find that there is a statutory requirement for a separate determination of dangerousness focusing on the likelihood of future serious misconduct on the part of the alien. See Crespo-Gomez v. Richard, 780 F.2d 932 (11th Cir. 1986); Zardui-Quintana v. Richard, 768 F.2d 1213 (11th Cir. 1985) (Vance, J., concurring).

Has this applicant been convicted of a particularly serious crime? In addition to two other offenses, the applicant was convicted in the State of Florida, on February 18, 1983, of two counts of armed robbery and two counts of attempted armed robbery. The offenses involved the use of a firearm. They were felonies, as well as offenses against individuals. On their face, they were dangerous.

Robbery is a grave, serious, aggravated, infamous, and heinous crime. See Matter of Rodriguez-Palma, 17 I&N Dec. 465 (BIA 1980). We have previously found a California conviction for armed robbery to be a crime rendering an alien statutorily ineligible for withholding of deportation. See Matter of Rodriguez-Coto, Interim

Decision 2985 (BIA 1985). We have little difficulty concluding that the applicant herein has been convicted of a particularly serious crime and, therefore, constitutes a danger to the community of the United States within the meaning of section 243(h)(2)(B) of the Act. Moreover, the same reasons that lead us to conclude this applicant has been finally convicted of such a crime satisfy us that his request for asylum properly warrants denial in the exercise of discretion.

The applicant complains that the immigration judge erred by refusing to admit background information, including the circumstances of the armed robberies, into evidence. We conclude that there has been no error on the part of the immigration judge as the crimes at issue in this case are inherently "particularly serious."

In Matter of Saban, 18 I&N Dec. 70 (BIA 1981), we stated that, pursuant to 8 C.F.R. § 208.10(b) (1981), when an applicant files an application for asylum after he has been placed in exclusion proceedings, the immigration judge must adjourn the hearing for the purpose of requesting an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs (BHRHA), Department of State. See 8 C.F.R. § 236.3(a) (1985).

This case is distinguishable from Matter of Saban, supra. In Saban, it did not appear that the alien was statutorily precluded from withholding of deportation; nor was it evident that asylum would be denied in the exercise of discretion.

In these proceedings, on the other hand, it is clear that the applicant is statutorily ineligible for withholding of deportation. Even if we assume that the applicant established the merits of his claim, no purpose would be served by obtaining an advisory opinion if the ultimate result, as here, is to statutorily preclude the applicant from relief. Similarly, the merits of the applicant's asylum claim need not be addressed. See INS v. Rios-Pineda, ___ U.S. ___, 105 S. Ct. 2098 (1985); INS v. Bagamasbad, 429 U.S. 24 (1976). See generally Matter of Reyes, 18 I&N Dec. 249 (BIA 1982). It is evident, based on the applicant's convictions for armed robbery and attempted armed robbery, that asylum would be denied as a matter of discretion. Therefore, no purpose is served by obtaining an advisory opinion when, notwithstanding a favorable recommendation, relief is denied on discretionary grounds.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

3008

MATTER OF SIEMENS MEDICAL SYSTEMS, INC.

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DEPOSITORY 376

In Visa Petition Proceedings

DEN-N-8540

Decided by Commissioner March 31, 1986

(1) Where each of two corporations (parents) owns and controls 50 percent of a third corporation (joint venture), the joint venture is a subsidiary of each of the parents for purposes of section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L) (1982). Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982) clarified.

(2) Each parent, through ownership and control of 50 percent of the voting shares of the joint venture, has the power to prevent action by that company through exercise of its veto power; hence, each parent "negatively" controls that company.

(3) All agreements between the parents relating to voting of the shares, distribution of profits, management and direction of the subsidiary, and similar factors which affect actual control over 50 percent of the subsidiary must be identified. Unless such agreements restrict the actual control of one parent, the 50-percent ownership will be deemed per se control.

ON BEHALF OF PETITIONER: Martin R. Greenberg, Esquire
60 East 42nd Street
New York, New York 10165

This appeal is before the Commissioner from the February 27, 1985, decision of the district director denying the visa petition to classify the beneficiary under section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L) (1982). The district director found that the petitioner had failed to establish an affiliation with the beneficiary's foreign employer. The appeal will be sustained.

I. FACTS

The petitioner, Siemens Medical Systems, Inc., seeks to classify the beneficiary as an intracompany transferee under section 101(a)(15)(L) of the Act to enable the beneficiary to provide services as a senior technical representative for medical x-ray equipment for its operation in the United States. Section 101(a)(15)(L) requires the beneficiary to be coming to the United States to continue employment in a managerial, executive, or specialized knowledge capacity with the same employer, its parent, branch, subsidiary, or affiliate with which the beneficiary was continuously employed abroad for the immediate prior year.

The petitioner is a United States wholly-owned subsidiary of Siemens AG, a multinational corporation headquartered in West Germany, and is involved in the development and sale of medical and dental equipment and systems. The beneficiary was employed as an x-ray engineer by wholly-owned subsidiaries of Siemens AG from 1975 until 1982. In July 1982, the beneficiary was transferred to Hospitalia International GmbH, a 50-50 joint venture between Siemens AG and Phillips International, to work on an x-ray maintenance project at King Hussein Medical Center, Amman, Jordan. After the project terminated in January 1985, he was reassigned to Siemens AG headquarters.

II. CASE HISTORY, DECISION, AND APPEAL

The petition was filed on February 14, 1985. On February 27, 1985, the district director denied the petition after determining, following Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982), that the petitioner submitted no evidence that Siemens AG controls Hospitalia International and, therefore, failed to establish that affiliation exists between Siemens Medical Systems and Hospitalia International. On April 15, 1985, the petitioner filed a motion to reopen and reconsider in which it argued that the beneficiary's identity as an employee of Siemens AG was not terminated or otherwise affected by his assignment to Hospitalia. The district director denied the motion, noting that there is nothing in the record to indicate that the beneficiary should be considered an employee of Siemens during the time he was at Hospitalia; nor is there evidence that Siemens exercises control over the management or policies of Hospitalia, which is required for affiliation.

On appeal, the petitioner contends that a qualifying affiliation under the statute exists between itself and Hospitalia through Siemens AG and makes the following argument:

> Control does not nor should not mean total control. In the case at hand, it has previously been documented that Siemens AG supplies most of the technical personnel to Hospitalia International and owns 50% of the assets and 50% of the outstanding shares of stock in Hospitalia International. These three items, as indicated in the above section, should be sufficient to show control in order to establish affiliation as is defined under the immigration laws. However, it should be further noted that Siemens AG also participates in profits from Hospitalia International on a 50-50 basis; Hospitalia International's board of directors is comprised by 50% of people from Siemens AG; Hospitalia International does not manufacture equipment, but installs all necessities used in hospitals--to wit, beds, x-ray machinery, and other diagnostic equipment. The medical equipment used by Hospitalia International in the equipping of these hospitals is manufactured by Siemens AG.

The petitioner also notes that the beneficiary's identity as an employee of Siemens AG remained constant despite the beneficiary's assignment to Hospitalia. When the beneficiary went to Hospitalia International, he was assigned by Siemens AG and did not seek employment with Hospitalia International on his own volition and, at the end of his term with Hospitalia International, remained an employee of Siemens AG.

III. ANALYSIS AND CONCLUSION

Classification under section 101(a)(15)(L) of the Act requires consideration of several factors including, among others, whether or not there is a qualifying relationship between the petitioner and the entity from which the beneficiary will be transferred; whether or not the beneficiary has been employed abroad continuously for the immediate prior year in a managerial, executive, or specialized knowledge capacity by a parent, branch, subsidiary, or affiliate of the petitioner; and whether the proposed employment in the United States will be in a qualifying capacity.

A. RELATIONSHIP BETWEEN THE ENTITIES

In this case, it must be established that there is a qualifying relationship between Siemens Medical Systems, Inc. (a wholly-owned subsidiary of Siemens AG) and Hospitalia International GmbH (a 50-50 joint venture established by Siemens AG and Phillips International).

The Service will accept the interpretation that a 50-50 joint venture creates a subsidiary relationship for purposes of section 101(a)(15)(L) of the Act. Where each of two corporations (parents) owns and controls 50 percent of a third corporation (joint venture), the joint venture is a subsidiary of each of the parents. There is no majority control, but where each parent through ownership and control of 50 percent of the voting shares of the joint venture has the power to prevent action by that company through exercise of its veto power, it "negatively" controls that company. That company is, therefore, properly regarded as a subsidiary of each parent.

The petitioner has the burden of establishing that the parent owns and controls 50 percent of the claimed subsidiary. To enable the Service to determine whether de facto control exists, the petition must identify all agreements between the parents relating to voting of the shares, management and direction of the subsidiary, and similar factors which affect actual control over 50 percent of the subsidiary. Unless such agreements restrict actual control of one parent, the 50-percent ownership will be deemed per se control.

The petitioner has provided sufficient evidence to establish that Hospitalia is a subsidiary of Siemens AG. The evidence shows that Siemens AG has de facto control over 50 percent of the voting shares. It jointly manages the joint venture, shares equally in its profits, and manufactures the equipment sold and installed by Hospitalia. Since Siemens Medical Systems, Inc. is a subsidiary of Siemens AG, it is an affiliate of Hospitalia. The subsidiary and affiliate relationships in this case conform to the holdings of *Matter of Hughes*, *supra*, where it was held that: (1) The term "subsidiary" is a more specific form of affiliation in which the company so described is subordinate to the control of another, and (2) the term "affiliate" is sometimes more specifically used to describe the relationship between two companies which have no direct linkage, but are directed, controlled, and at least partially owned by the same parent corporation. We conclude that there is a qualifying relationship for purposes of section 101(a)(15)(L) of the Act between the petitioner and the beneficiary's employers abroad.

B. BENEFICIARY'S EMPLOYMENT

It is evident from the facts of the case that the beneficiary had been employed abroad continuously by subsidiaries of the same parent corporation since 1975 until his reassignment to that parent in January 1985. His employment was in a specialized knowledge capacity and the proposed employment in the United States will be in a specialized knowledge capacity. It has been established that the beneficiary's employment qualifies him for classification under section 101(a)(15)(L) of the Act.

ORDER: The appeal is sustained. The decision of the district director is withdrawn and the petition is approved.

3009

MATTER OF AMORNVOOTISKUL

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In Deportation Proceedings

A-22450984
A-22450985

Decided by Board April 1, 1986

(1) Under the pertinent provisions of section 19 of the Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611 [codified at 8 U.S.C. § 1151 (1982)], an alien is not subject to the numerical limitations of the Act if he was present in the United States on or before June 1, 1978, and was qualified as a nonpreference immigrant under section 203(a)(8) of the Act, 8 U.S.C. § 1153(a)(8) (1982); was exempt from the labor certification requirement of section 212(a)(14) of the Act, 8 U.S.C. § 1182(a)(14) (1982), as a qualified investor; and properly filed an application for adjustment of status to that of an alien lawfully admitted for permanent residence, which is still pending.

(2) Section 19 of the 1981 Amendments to the Act has been interpreted by the Immigration and Naturalization Service in its regulations to mean that an application for adjustment of status may be approved after June 1, 1978, provided that the applicant has a priority date on or before June 1, 1978, and meets the other requirements of section 19. See 8 C.F.R. § 245.1(c)(2)(iv) (1986).

CHARGE:
ORDER: Act of 1952 - Sec. 241(a)(2) [8 U.S.C. § 1251(a)(2)] - Nonimmigrants - remained longer than permitted

ON BEHALF OF RESPONDENTS:
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Fallon, Bixby, McVey & Cheng
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ON BEHALF OF SERVICE:
Leonard A. Rosenberg
Assistant District
Counsel

BY: Milhollan, Chairman; Dunne, Morris, and Vacca, Board Members

This case was last before us on February 13, 1980, when we sustained the respondents' appeal from the immigration judge's April 24, 1979, denial of their application for adjustment of status and remanded the record to the immigration judge for reconsideration of their application for adjustment relief. On August 10, 1984, the immigration judge found the respondents eligible for adjustment relief and granted their application as a matter of discretion. The Service appealed. 1/ The immigration judge's decision will be affirmed.

The pertinent facts relating to the merits of the investment were fully discussed in the immigration judge's August 10, 1984, decision. For purposes of clarity we will only discuss the facts that directly relate to the issues raised on appeal.

The respondents, a married couple, are natives and citizens of Thailand. The male respondent is 37 years old, and the female respondent is 38 years old. The male respondent was admitted to the United States on or about February 12, 1969, as a nonimmigrant student. Including extensions, he was authorized to remain in the United States until February 16, 1976. The female respondent was admitted on or about November 25, 1973, as a nonimmigrant student authorized to remain until November 24, 1974. On June 30, 1976, the respondents applied to an Immigration and Naturalization Service district director for adjustment of status to that of permanent residents under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1245 (1982). In a decision dated September 1, 1977, the district director denied the application and granted the respondents the privilege of departing from the United States on or before September 15, 1977, without the issuance of Orders to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien (Form I-221S). The respondents did not depart, and on November 24, 1978, Orders to Show Cause were issued alleging that they were deportable under section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2) (1982), on the ground that they had remained

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1/ In response to the Service appeal, the respondents' counsel has questioned the timeliness of the appeal. In order to remove any jurisdictional questions, we are considering this appeal on certification pursuant to 8 C.F.R. § 3.1(c) (1986).

in the United States longer than permitted. On April 24, 1979, the respondents conceded deportability as charged and proceeded to renew their application for adjustment of status pursuant to 8 C.F.R. § 245.2(a)(4) (1986).

In his April 24, 1979, decision the immigration judge found the respondents deportable as charged. He also concluded that the female respondent did not qualify for adjustment of status as an investor as defined in 8 C.F.R. § 212.8(b) (1979). He therefore concluded that the male respondent's application for adjustment relief should also be denied, but only as a matter of discretion, because his wife was ineligible. Our February 13, 1980, decision disagreed with the immigration judge's basis for concluding that the female respondent was ineligible for adjustment of status as an investor. We therefore remanded the record to the immigration judge for reconsideration of both respondents' applications for adjustment relief.

On remand a new immigration judge conducted a hearing on April 10, 1981, regarding the application for adjustment relief. At that time the Service, through its trial attorney, did not indicate opposition to the adjustment application and the hearing was adjourned (Tr. at 48). The record contains correspondence between the parties and the immigration judge, requesting financial information and referring to a possible application for suspension of deportation. However, a new trial attorney subsequently entered the case and expressed his opposition to the adjustment application in a short memorandum dated February 4, 1983, stating that adjustment should not be granted because the respondents lacked visa availability, did not qualify as investors, and were undeserving of adjustment relief as a matter of discretion.

On April 7, 1984, the respondents, through counsel, submitted a brief in support of their application for adjustment relief. On August 10, 1984, the immigration judge entered a decision granting the adjustment applications. The immigration judge found that the respondents' investment met the requirements of 8 C.F.R. § 212.8(b)(4) (1984) for an exemption from the labor certification requirement and that they were not precluded from adjustment relief by section 245(c)(2) of the Act, 8 U.S.C. § 1255(c)(2) (1982). The immigration judge then found that the respondents qualified for visa availability under section 19 of the Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611 [codified at 8 U.S.C. § 1151 (1982)], and granted their applications as a matter of discretion. The Service subsequently appealed. We now turn to our discussion of the eligibility issue.

The question of the respondents' eligibility for adjustment of status as investors turns on the interpretation of section 19 of the 1981 Amendments to the Act, which reads as follows:

> Sec. 19. The numerical limitations contained in sections 201 and 202 of the Immigration and Nationality Act shall not apply to any alien who is present in the United States and who, on or before June 1, 1978 --
>
> (1) qualified as a nonpreference immigrant under section 203(a)(8) of such Act (as in effect on June 1, 1978);
>
> (2) was determined to be exempt from the labor certification requirement of section 212(a)(14) of such Act because the alien had actually invested, before such date, capital in an enterprise in the United States of which the alien became a principal manager and which employed a person or persons (other than the spouse or children of the alien) who are citizen of the United States or aliens lawfully admitted for permanent residence; and
>
> (3) applied for adjustment of status to that of an alien lawfully admitted for permanent residence.

The relevant segment of section 19 of the 1981 Amendments has been interpreted by the Service in its regulations at 8 C.F.R. § 245.1(c)(2)(iv) (1986). See 47 Fed. Reg. 12129, 12133 (1982); 47 Fed. Reg. 44233, 44237 (1982). It states:

> Any applicant will have qualified as a nonpreference immigrant on or before June 1, 1978 for purposes of this section, if the application for investor status was actually approved on or before that date, *or the application was subsequently approved with a priority date on or before June 1, 1978*. (Emphasis added.)

Under the restrictive interpretation of the statutory language urged by the district counsel in this case, the respondents would not qualify for investor status, since no formal determination that they qualified as investors took place prior to June 1, 1978. The immigration judge's eventual conclusion that the respondents qualified for investor status took place on August 10, 1984, pursuant to our February 1, 1980, remand order.

We find that the Service interpretation of the statute, found in 8 C.F.R. § 245.1(c)(2)(iv) (1986), is controlling in this case. The regulation specifically contemplates that the application for investor status may be approved after June 1, 1978. The determinative date under the regulation is the priority date, and not the date that the application for investor status is approved. The legislative history of section 19 of the 1981 Amendments explicitly states that section 19 was intended to provide visa availability to those investor applicants who lost their visa availability while their properly filed investor application was pending. *See* H. R. Rep. No. 264, 97th Cong., 1st Sess. 35, 45, 50, 58 (1981), *reprinted in* 1981 U.S. Code Cong. & Ad. News 2577, 2604, 2614, 2619, 2627. Prior to the 1981 Amendments the Service had established a policy, detailed in Operations Instructions 245.4(a)(6), of holding such applications in abeyance until allocation of a visa was again possible. *See Matter of Huang*, 16 I&N Dec. 358, 360 (BIA 1977); *Matter of Ho*, 15 I&N Dec. 692 (BIA 1976); 2 C. Gordon & H. Rosenfield, *Immigration Law and Procedure*, § 7.7e(7)(c) at 7-116.6 (rev. ed. 1986). The position taken by the Service in this case cannot be reconciled with the language of 8 C.F.R. § 245.1(c)(2)(iv) (1986) and O.I. 245.4(a)(6).

The United States Court of Appeals for the Eleventh Circuit in Kahlenberg v. INS, 763 F.2d 1346, 1349-1351 (11th Cir. 1985), apparently agreed in dictum with the district counsel's interpretation of section 19 of the 1981 Amendments to the Act. However, in its discussion of section 19 in Kahlenberg, the Eleventh Circuit specifically stated that it had accepted this interpretation of section 19 because it was giving deference to the Service's own interpretation, since "the promulgating agency's construction of its own regulations may be discounted only if clearly unreasonable." Id. at 1351. It is clear that the court was not aware of 8 C.F.R. § 245.1(c)(2)(iv) (1985) when it accepted this interpretation. We therefore now hold that our interpretation of section 19 of the 1981 Act is entirely consistent with the Service's interpretation of the statute, found in 8 C.F.R. § 245.1(c)(2) (1986). We find unconvincing the district counsel's argument to the contrary (brief at 8-9), which cannot be reconciled with the view of the Service, expressed in its own regulation. There are no other questions regarding the respondents' eligibility for investor status. Consequently, we affirm the immigration judge's conclusion that the respondents qualify as investors with visa availability pursuant to section 19 of the 1981 Amendments to the Act. We also agree with the immigration judge's favorable exercise of discretion. The adverse factors present in this case are outweighed by the favorable factors here. See Matter of Khan, 17 I&N Dec. 508 (BIA 1980). Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

3010

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MATTER OF TORRES

In Exclusion Proceedings

A-22925710
A-22925711

Decided by Board April 18, 1986

(1) In holding that an applicant for adjustment of status who is returning to the United States pursuant to a grant of advance parole under 8 C.F.R. § 212.5(d)(2) (1986) is properly placed in exclusion proceedings, the Board of Immigration Appeals specifically declined to follow Joshi v. INS, 720 F.2d 799 (4th Cir. 1983), and Patel v. Landon, 739 F.2d 1455 (9th Cir. 1984), outside of the courts' respective circuits.

(2) The applicants, who no longer derive protection from the dissolved injunction in Silva v. Bell, 605 F.2d 978 (7th Cir. 1979), were properly placed in exclusion proceedings and, hence, were not entitled to apply for suspension of deportation.

EXCLUDABLE:
Act of 1952 - Sec. 212(a)(20) [8 U.S.C. § 1182(a)(20)] - No valid immigrant visa

ON BEHALF OF APPLICANT:
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Archdiocese of San Antonio
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ON BEHALF OF SERVICE:
Eloise Rosas
District Counsel

BY: Milhollan, Chairman; Dunne, Morris, and Vacca, Board Members

The applicants appeal from the May 1, 1984, decision of the immigration judge finding them excludable from the United States, and, therefore, denying their applications for suspension of deportation pursuant to section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1) (1982). The appeal will be dismissed.

The applicants' excludability under section 212(a)(20) of the Act, 8 U.S.C. § 1182(a)(20) (1982), is the determinative issue raised at the exclusion hearing. The fact that the applicants lacked immigrant visas when they last arrived in the United States is undisputed. However, the applicants appeal from the immigration judge's conclusion that they were properly placed in exclusion proceedings, and, therefore, were ineligible for suspension of deportation.

The parties stipulated that the applicants last arrived in the United States at Laredo, Texas, on November 30, 1978, and sought admission to resume their status as Silva aliens. See Silva v. Bell, 605 F.2d 978 (7th Cir. 1979), modifying Silva v. Bell, No. 76-C 4268 (N.D. Ill. Oct. 10, 1978). They did not present an immigrant visa or other document to permit their entrance as immigrants (Tr. at 5). They were paroled into the United States pursuant to section 212(d)(5) of the Act, because they had obtained advance parole from the district director in order to make a brief visit abroad (Tr. at 10) (Group Exhs. 3 and 4).

Advance parole is a flexible humanitarian device rooted in the public interest. See 8 C.F.R. § 212.5(a)(2) (1986); Immigration and Naturalization Service Operations Instructions 212.5(c). Such advance parole may be granted for humanitarian reasons to aliens present in the United States, including applicants for adjustment of status whose application for adjustment relief is pending, and who have to depart temporarily from the United States for emergent personal or bona fide business reasons, in order that their applications for adjustment of status are not deemed abandoned. See 8 C.F.R. §§ 212.5, 245.2(a)(3) (1986); Operations Instructions 212.5(c); 1 C. Gordon and H. Rosenfield, Immigration Law and Procedure, § 2.54, at 2-368 to 375 (rev. ed. 1986).

The applicants were in the United States as applicants claiming western hemisphere visa availability pursuant to the Silva decision, as noted above. The male applicant had entered the United States in February of 1973, as a nonimmigrant visitor for a period not to exceed 72 hours pursuant to a Nonresident Alien Mexican Border Crossing Card (Form I-186). The female applicant had also entered as a nonimmigrant visitor allowed to remain for 72 hours pursuant to a Form I-186. Neither departed. Their deportation to Mexico had been stayed pursuant to the Silva decision. In November of 1978, while their adjustment of status application was pending, the female applicant's father in Mexico became sick. Consequently, on November 17, 1978, they applied for, and were granted, advance parole on humanitarian grounds to visit her father and return to the United States before December 2, 1978 (Group Exh. 4). When they returned from Mexico on November 30, 1978, the Silva injunction was still in effect. Consequently, their exclusion proceedings were held in abeyance pending allocation of the immigrant visas made available pursuant to the Silva injunction. The propriety of exclusion proceedings is determinative in this case because the applicants seek to apply for suspension of deportation, and suspension of deportation is a form of relief from deportation unavailable to aliens in exclusion proceedings. See Matter of E-, 3 I&N Dec. 541 (BIA 1949).

It is well settled that when an alien is paroled into the United States pursuant to section 212(d)(5) of the Act and 8 C.F.R. § 212.5 (1986), pending exclusion proceedings in accordance with sections 235 and 236 of the Act, 8 U.S.C. §§ 1225 and 1226 (1986), and Parts 235 and 236 of Title 8 of the Code of Federal Regulations, he does not gain the additional protections prescribed for deportation proceedings. Rogers v. Quan, 357 U.S. 193 (1958); Leng May Ma v. Barber, 357 U.S. 185 (1958); Luk v. Rosenberg, 409 F.2d 555 (9th Cir. 1969); United States ex rel. Sellas v. Esperdy, 366 F.2d 266 (2d Cir. 1966); United States ex rel. Lam Hai Cheung v. Esperdy, 345 F.2d 989 (2d Cir. 1965); Wong Hing Fun v. Esperdy, 335 F.2d 656 (2d Cir. 1964); Wong Hing Goon v. Brownell, 264 F.2d 52 (9th Cir. 1959); Licea-Gomez v. Pilliod, 193 F.Supp. 577, 579-80 (N.D. Ill. 1960); United States ex rel. Tom We Shung v. Murff, 176 F.Supp. 253, 256 (S.D.N.Y. 1959); In re Milanovic's Petition, 162 F.Supp. 890, 894 (S.D.N.Y. 1957), aff'd, 253 F.2d 941 (2d Cir. 1958). It is similarly established that an alien properly in exclusion proceedings is not entitled to apply for suspension of deportation, despite being present in the United States on parole for an extensive period of time. Low v. Attorney General, 479 F.2d 820 (9th Cir.), cert. denied, 414 U.S. 1039 (1973).

The court's injunction in Silva v. Bell, supra, has now been dissolved, after all available western hemisphere immigrant visas were allocated. See Sanchez-Escareno v. INS, 681 F.2d 1133 (9th Cir. 1982). Consequently, the applicants no longer derive any protection from the terms of the Silva court's injunction. The United States Court of Appeals for the Ninth Circuit has recently concluded that the Silva injunction did not exempt Silva aliens from complying with the 7 years' continuous physical presence requirement of section 244(a)(1) of the Act, even if their departure from the United States and illegal return took place prior to the Supreme Court's strict interpretation of that requirement in INS v. Phinpathya, 464 U.S. 183 (1984). See Baques-Valles v. INS, 779 F.2d 483 (9th Cir. 1985); cf. Matter of Dilla, Interim Decision 2962 (BIA 1984). Nevertheless, the applicants contend that since they had submitted applications for adjustment of status as Silva aliens on September 5, 1978, and made their sojourn to Mexico pursuant to a grant of advance parole, they should be placed in deportation proceedings where they could also submit applications for suspension of deportation. In support of this contention the applicants cite the court's decision in Joshi v. INS, 720 F.2d 799 (4th Cir. 1983), and the subsequent Patel v. Landon, 739 F.2d 1455 (9th Cir. 1984), that held that an applicant for adjustment of status returning to the United States pursuant to a grant of advanced parole is entitled to have his application for adjustment of status considered in deportation proceedings.

The issue in both the Joshi and Patel cases involved an interpretation of 8 C.F.R. § 245.2(a)(3) (1983) regarding the termination of applications for adjustment of status under the "deemed abandoned" concept. The pertinent part of 8 C.F.R. § 245.2(a)(3) (1983) then stated as follows:

> The departure of an applicant [for permanent resident status under section 245 of the Act] who is not under deportation proceedings shall be deemed an abandonment of his application constituting grounds for termination

> thereof unless he had previously been *granted permission by the Service for such absence and* he was *thereafter inspected* upon his return, *or* it is *determined* by the officer having jurisdiction over his application *that his departure was unintended or innocent and casual, that his absence was brief*, and that he was inspected upon his return. If the determination reached is favorable to the applicant, *the application shall be adjudicated without regard to the departure and absence*. (Emphasis added.)

The *Joshi* and *Patel* cases arose outside of the jurisdiction of the United States Court of Appeals for the Fifth Circuit, where this case arises. Consequently, the applicants seek to have us apply the holdings in those cases outside of the jurisdictions of the Fourth and Ninth Circuit Courts of Appeals. 1/ Moreover, the applicants request that we extrapolate the holdings in *Joshi* and *Patel* from the adjustment of status area to suspension of deportation issues. The applicants contend that they should be placed in deportation proceedings so that they may submit applications for suspension of deportation. We decline to do so for the following reasons.

First, we disagree with the analysis underlying the decisions in *Joshi* v. *INS*, *supra*, and *Patel* v. *Landon*, *supra*. Both decisions erroneously assume that an alien must be placed in deportation proceedings in order to have his application for adjustment of status properly considered. The court in *Joshi* v. *INS*, *supra*, at 801, relied on the Supreme Court's decision in *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963), in interpreting the language in 8 C.F.R. § 245.2(a)(3) (1983), underlined above. The *Joshi* court merely stated, without explaining, that the regulations applied

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1/ The United States Court of Appeals for the Fifth Circuit recently declined to express its view on this issue because it lacked direct appellate jurisdiction over orders of exclusion. *See* *Delgado-Carrera* v. *INS*, 773 F.2d 629 (5th Cir. 1985); *cf.* *Castillo-Magallon* v. *INS*, 729 F.2d 1227 (9th Cir. 1984).

the Fleuti rationale and, therefore, that "[t]his case, we believe, provides a proper occasion for giving effect to this aspect of Fleuti." Joshi v. INS, supra, at 801. The court in Patel v. Landon, supra, at 1457, merely cited Joshi v. INS, supra, on this issue, without further analysis. However, the Supreme Court in INS v. Phinpathya, 464 U.S. 183, 188 (1984), had already specifically noted that its previous holding in Rosenberg v. Fleuti, supra, applied only to lawful permanent residents whose brief absence abroad was excepted from the definition of entry pursuant to section 101(a)(13) of the Act, 8 U.S.C. § 1101(a)(13) (1982). Consequently, we cannot agree with the Joshi and Patel decisions' application of the Fleuti doctrine to aliens who had not been admitted for lawful permanent residence, in the context of interpreting the language of 8 C.F.R. § 245.2(a)(3) (1983). INS v. Phinpathya, supra.

A second reason for declining to adopt the Joshi and Patel courts' interpretation of 8 C.F.R. § 245.2(a)(3) (1983) is its inconsistency with the other pertinent language in the regulations. The language in 8 C.F.R. §§ 236.4, 245.2(a)(1), and 245.2(a)(4) (1986), referring to an application for adjustment of status denied by a district director being renewed in exclusion proceedings, is rendered a nullity if we were to conclude that deportation proceedings are required for adjustment applicants making a brief visit abroad as defined in 8 C.F.R. § 245.2(a)(3) (1983). It is also clear from the comments accompanying these regulations when proposed that the consideration of these applications in exclusion proceedings was the method contemplated. 2/ See 43 Fed. Reg. 16445, 16446 (1978), 33 Fed. Reg. 17135, 17136, (1968). Consequently, the two courts' conclusion that the regulation's use of the language "brief," "casual," and "unintended or innocent" requires the institution of deportation proceedings is

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2/ 8 C.F.R. § 245.2(a)(3) (1983) has now been clarified, effective April 3, 1986, to remove the language about unintended, innocent, casual, and brief departures from the United States, and also to specify that aliens returning to the United States pursuant to a grant of advance parole are subject to exclusion proceedings and are not entitled to a deportation hearing. See 51 Fed. Reg. 7431 (1986).

unwarranted. The regulations were merely describing the type of absences from the United States which would not result in the abandonment of an adjustment application.

An alien paroled into the United States pursuant to section 212(d)(5) of the Act remains subject to exclusion proceedings pursuant to sections 235 and 236 of the Act. See 8 C.F.R. § 212.5(d)(2) (1986). Section 212(d)(5) specifically states that an alien paroled into the United States pursuant to that section must be dealt with as any other applicant for admission upon termination of the parole. It is well settled that this Board's jurisdiction is bound by properly enacted regulations. Matter of Bilboa-Bastida, 11 I&N Dec. 615 (BIA 1966), aff'd, Bilboa-Bastida v. INS, 409 F.2d 820 (9th Cir.), cert. denied, 396 U.S. 802 (1969); Matter of Tzimas, 10 I&N Dec. 101 (BIA 1962). Consequently, we cannot disregard the language in 8 C.F.R. §§ 212.5(d)(2), 236.4, and 245.2(a)(1) (1986), which contemplate such an applicant being placed in exclusion proceedings. It is similarly well settled that this Board cannot question the propriety of the statutes enacted by Congress. See Matter of Chery and Hasan, 15 I&N Dec. 380 (BIA 1975); Matter of Santana, 13 I&N Dec. 62 (BIA 1969); Matter of L-, 4 I&N Dec. 556 (BIA 1951). Since both section 212(d)(5) of the Act and 8 C.F.R. § 212.5(d)(2) (1986), as well as the recently promulgated 8 C.F.R. § 245.2(a)(3) (1986), prescribe that an alien paroled into the United States must be placed in exclusion proceedings, we would be unable to adopt the Joshi and Patel decisions beyond the boundaries of the jurisdictions in which those two cases arose. In any event, as we disagree with the decisions, we decline to follow the position of the Fourth and Ninth Circuits outside of those circuits.

A final question raised by the applicants' appeal remains to be addressed. Attached to the applicants' brief is a February 13, 1985, memorandum from the Service's Associate Commissioner and addressed to all regional commissioners, district directors, and officers in charge. The memorandum states that the Service has reversed its previous conclusions regarding holding in abeyance the applications for adjustment of status of Silva aliens pursuant to Operations Instructions 245.4(a)(6). 3/ It further states that such applications should now be reactivated by means of a Service motion to reopen and held in abeyance in accordance to Operations Instructions 245.4(a)(6).

Here no such motion has been submitted by the Service. 4/ Consequently, absent such a motion, we must proceed to dismiss the appeal since we cannot review the district director's decision to initiate these proceedings. See Lopez-Tellez v. INS, 564 F.2d 1304 (9th Cir. 1977); Matter of Quintero, 18 I&N Dec. 348 (BIA 1982); Matter of Marin, 16 I&N Dec. 581 (BIA 1978); Matter of Merced, 14 I&N Dec. 644 (BIA 1974); Matter of Geronimo, 13 I&N Dec. 680 (BIA 1971). It is so ordered.

ORDER: The appeal is dismissed.

3/ Operations Instructions 245.4(a)(6) prescribes that applications for adjustment of status filed with visa availability, which cannot be approved solely because a visa number is not available at the time of processing, should be held in abeyance pending the allocation of a visa number. See Matter of Huang, 16 I&N Dec. 358 (BIA 1977); Matter of Ho, 15 I&N Dec. 692 (BIA 1976).

4/ Such a motion may be submitted by the Service after the exclusion order is final. See Matter of Rangel-Cantu, 12 I&N Dec. 73 (BIA 1967).

3011

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MATTER OF VELASQUEZ

In Deportation Proceedings

A-26389579

Decided by Board April 9, 1986

(1) There is a strong presumption that an attorney's decision to concede an alien's deportability in a motion for change of venue was a reasonable tactical decision, and, absent a showing of egregious circumstances, such a concession is binding upon the alien as an admission.

(2) It is immaterial whether an alien actually authorized his attorney to concede deportability in a motion for change of venue, for so long as the motion was prepared and filed by an attorney of record on behalf of his alien client, it is prima facie regarded as authorized by the alien and is admissible as evidence.

(3) An allegation that an attorney was authorized to represent an alien only to the extent necessary to secure a reduction in the amount of bond does not render inadmissible the attorney's concession of deportability in a pleading filed in regard to another matter, for there is no "limited" appearance of counsel in immigration proceedings.

CHARGE:

Order: Act of 1952 - Sec. 241(a)(2) [8 U.S.C. § 1251(a)(2)] - Entered without inspection

ON BEHALF OF RESPONDENT:
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Houston, Texas 77098

ON BEHALF OF SERVICE:
Benjamin D. Somera
General Attorney

BY: Milhollan, Chairman; Dunne, Morris, and Vacca, Board Members

The respondent has appealed the oral decision of the immigration judge rendered at the deportation hearing of August 17, 1983. That decision finds the respondent deportable pursuant to section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2) (1982), as an alien who entered the United States without inspection, but grants the respondent the privilege of voluntary departure in lieu of deportation. The appeal shall be dismissed.

The issues raised by the respondent in this appeal require some understanding of the circumstances surrounding both his arrest and the granting of his motion for change of venue. Since the facts pertaining to these events are not discussed in the immigration judge's decision, we think it important to set them forth.

The respondent was arrested by officers of the Immigration and Naturalization Service on April 30, 1982, while he and several other men were leaving their place of work in Channelview, Texas. 1/ The respondent and the other men were taken to the Service offices in Houston, Texas. There the Service interviewed the respondent and commenced deportation proceedings against him by issuing an Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien (Form I-221S), alleging that he is a native and citizen of Colombia, who entered the United States without inspection in 1977, and charging him with deportability pursuant to section 241(a)(2) of the Act. The Service determined not to release the respondent on bond but to keep him in custody pursuant to 8 C.F.R. § 242.2(a) (1982). Accordingly, the respondent was

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1/ In an affidavit the respondent filed in conjunction with a motion to suppress admissions he made at the time of his arrest and questioning by the Service, the respondent has attested to his version of the facts surrounding his arrest. The Service did not present any evidence about the circumstances of the respondent's arrest. Accordingly, we have relied on his affidavit for the sequence of events surrounding his arrest.

flown to the Service's detention and processing center in El Paso, Texas, where he was kept in custody for 9 days until he secured his release. Since the Service had determined to keep the respondent in custody in El Paso, it also scheduled his deportation hearing for that city.

On May 7, 1982, an attorney (Velarde) in El Paso filed a Notice of Entry of Appearance as Attorney or Representative (Form G-28), notifying the Service that he was the respondent's attorney of record. On July 22, 1982, Velarde submitted a motion for change of venue requesting that the respondent's deportation hearing be moved to Houston, Texas. In the motion, attorney Velarde admitted all of the factual allegations in the Order to Show Cause, conceded the respondent's deportability, and requested that the hearing be moved to Houston, because the respondent lived in that city and would find it too inconvenient and costly to travel to El Paso. When the Service did not oppose the motion, the immigration judge issued an order on August 12, 1982, granting the request for a change of venue.

On March 14, 1983, a new attorney (Torres), located in Houston, entered his appearance as counsel for the respondent. At that time, Torres also filed a suppression motion, requesting a separate hearing to determine whether admissions made by the respondent at the time of his arrest were coerced or obtained in violation of the respondent's fourth and fifth amendment rights and should be excluded from evidence at his forthcoming deportation hearing. This motion was supported by the respondent's affidavit attesting to the facts surrounding his arrest and questioning by the Service and by various newspaper articles describing the Service's general procedures during workplace searches.

The respondent's deportation hearing was convened in Houston, Texas, on August 17, 1983. The respondent was present at the hearing with his new counsel, Torres, who renewed the motion to suppress. The immigration judge denied the motion. Thereafter, the respondent refused to admit the allegations and charge of deportability and invoked the fifth amendment privilege against self incrimination when asked to testify about his immigration status. Since it is a crime to enter the United States without inspection, the immigration judge found the respondent had properly invoked the privilege against self incrimination. See section 275 of the Act, 8 U.S.C. § 1325 (1982). In order to prove the respondent's deportability, therefore, the Service introduced into evidence the motion for change of venue containing the admissions and the concession of deportability that had been made by the respondent's first counsel, Velarde. Counsel Torres objected to admission of the motion. He contended that the respondent had never authorized Velarde to concede deportability. Torres also contended that the admissions and the concession of deportability exceeded the scope of Velarde's representation of the respondent, because the respondent had understood Velarde to be representing the respondent only to the extent necessary to obtain a reduction in the amount of his bond. Counsel Torres requested that the respondent be given an opportunity to testify in support of these contentions. The immigration judge denied the request and admitted the motion into evidence. The immigration judge found the admissions and the concession in the motion to be sufficient to prove the respondent's deportability as charged. The immigration judge denied a request by counsel Torres to permit the respondent to testify about the facts surrounding his treatment by the Service at the time of his arrest and questioning. The request was denied on the ground that the circumstances surrounding these events were immaterial to the admissibility of the motion for change of venue.

On appeal, the respondent has argued that his arrest and subsequent questioning by the Service violated his constitutional rights and that the immigration judge erred in denying the motion for a separate suppression hearing. The respondent has also argued that the motion for change of venue was improperly admitted into evidence because it was not authenticated and because the admissions contained in the motion were not authorized by the respondent. He also contends that his right to confront the witnesses against him and his right to due process were violated when the immigration judge refused the request to allow the respondent to testify that his first counsel, Velarde, was never authorized to concede deportability.

We reject all of these contentions.

The immigration judge correctly denied the motion for a separate suppression hearing. The respondent requested a suppression hearing in order to litigate the legality of his arrest and the admissibility of unspecified admissions that he alleges resulted from his arrest and detention. However, the exclusionary rule, which requires a court to suppress evidence that is the fruit of an unlawful arrest or of other official conduct that violates the fourth amendment, does not apply in deportation proceedings. INS v. Lopez-Mendoza, ____ U.S. ____, 104 S. Ct. 3479 (1984). Moreover, the Service never introduced, or attempted to introduce, any evidence or admissions obtained from the respondent at the time of his arrest and detention. The only evidence submitted by the Service was the motion for change of venue, which was filed by attorney Velarde almost 3 months after the respondent's arrest. Since it was filed well after the respondent's arrest, this motion is not tainted by any violations of the fourth or fifth amendments that may have occurred at the time of the respondent's arrest. Magallanes-Damien v. INS, 783 F.2d 931 (9th Cir. 1986); Hoonsilapa v. INS, 575 F.2d 735 (9th Cir.), modified, 586 F.2d 755 (9th Cir. 1978). Thus, the motion to suppress and its supporting affidavit were immaterial to the admissibility of the motion for change of venue, and the request for a suppression hearing was properly denied. Cf. Magallanes-Damien v. INS, supra; Hoonsilapa v. INS, supra.

The contention that the motion for change of venue was erroneously admitted because it was not sufficiently authenticated has no merit. The regulations specifically authorize the immigration judge to receive into evidence any prior written statement, made by a respondent or by any other person, that is material and relevant to the issues in the case. See 8 C.F.R. § 242.14(c) (1986). Furthermore, documentary evidence in deportation proceedings need not comport with the strict judicial rules of evidence; rather, in order to be admissible, such evidence need only be probative and its use fundamentally fair, so as not to deprive an alien of due process of law. See, e.g., Trias-Hernandez v. INS, 528 F.2d 366, 369 (9th Cir. 1975); Martin-Mendoza v. INS, 449 F.2d 918, 921 (9th Cir. 1974); cf. INS v. Lopez-Mendoza, supra, at 3490 and n.5.

The motion for change of venue is highly probative because it contains admissions and a concession that prove the respondent's deportability. Further, use of the motion was not fundamentally unfair. The motion previously had been submitted and accepted as part of the respondent's file, as noted by the Service stamp appearing on the upper left-hand corner of the motion. Thus, it already was a part of the official record of this proceeding at the time it was put forward by the Service as proof of the respondent's deportability. In addition, the respondent has not disputed that Velarde was counsel of record at the time the motion was filed; nor has the respondent contended that it is not Velarde's signature that appears on the motion. We also note that the record contains the signed August 1982 order by the immigration judge, granting a change of venue from El Paso to Houston, which obviously was issued in response to the motion. Indeed, absent this document, the respondent's hearing would have been improperly venued in Houston. Thus, the nature of the immigration judge's 1982 order also serves to authenticate the motion. Cf. Winel v. United States, 365 F.2d 646, 648 (8th Cir. 1966).

Moreover, the conduct of both the respondent and his second attorney, Torres, during the course of this matter is evidence from which the immigration judge reasonably could infer that the motion for change of venue is authentic. Conduct that forms the basis for inference is evidence. United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 153-54 (1923). The respondent, presumably, knew whether he had asked attorney Velarde to secure a change of venue, and, if the respondent had not, then he or attorney Torres had good reason to speak up and object at some point in these proceedings to the change. Neither the respondent nor counsel Torres ever did so. Under these circumstances, the failure to contest the change of venue is evidence from which we reasonably can infer that the motion is what it purports to be. Id. 2/

2/ The presence of other matters of record that reasonably authenticate the motion and of conduct in this case from which we can draw an inference that the motion is authentic

(Cont'd)

The immigration judge also correctly denied the respondent's request to testify about the scope of Velarde's authority to concede deportability in the motion for change of venue. The respondent's rights to present evidence and to confront the evidence against him are not absolute; they are circumscribed by the due process concept of reasonableness. See section 242(b) of the Act, 8 U.S.C. § 1252(b) (1982); Marroquin-Manriquez v. INS, 699 F.2d 129, 135 (3d Cir. 1983). Thus, the immigration judge's refusal to allow the respondent to testify violated his statutory and due process rights only if the refusal was unreasonable. It was not, for the testimony the respondent proffered would not have rendered inadmissible either the concession of deportability or the motion.

Absent egregious circumstances, a distinct and formal admission made before, during, or even after a proceeding by an attorney acting in his professional capacity binds his client as a judicial admission. Magallanes-Damien v. INS, supra; Thorsteinsson v. INS, 724 F.2d 1365, 1367-68 (9th Cir.), cert. denied, ____ U.S. ____, 104 S. Ct. 2386 (1984); see also 31A C.J.S. Evidence § 361 (1964). Thus, when an admission is made as a tactical decision by an attorney in a deportation proceeding, the admission is binding on his alien client and may be relied upon as evidence of deportability. Magallanes-Damien v. INS, supra; Rodriguez-Gonzalez v. INS, 640 F.2d 1139 (9th Cir. 1981); United States v. Guerra de Aguilera, 600 F.2d 752 (9th Cir. 1979).

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distinguishes the respondent's case from Iran v. INS, 656 F.2d 469, 472-73 (9th Cir. 1981), in which the United States Court of Appeals for the Ninth Circuit found there was no evidence from which an immigration judge could have inferred the authenticity of a disputed piece of documentary evidence. Id. at 473. While the Ninth Circuit in Iran described several acceptable methods of fairly showing that a challenged document is what it purports to be, the court did not preclude the use of reasonable inferences drawn from other materials already of record or from an alien's conduct. See id. at 472 n.8.

Counsel Velarde's admissions of fact and concession of deportability in the motion for change of venue come within these rules. The admissions and concession are distinct and formal, for they appear in a pleading filed with the immigration court. The admissions and concession were made by the respondent's attorney acting in his professional capacity because they were made by Velarde at a time when he was the respondent's official attorney of record. In addition, there is a strong presumption, which the respondent did not proffer any evidence to overcome, that counsel Velarde's decision to concede deportability in the motion was a reasonable tactical decision. Cf. Strickland v. Washington, 466 U.S. 668, 689 (1984). This presumption is enhanced in this case by the factors considered, and the nature of the inquiry, in determining whether to grant an alien's request for a change of venue. The decision whether to grant or deny a motion for change of venue rests solely in the discretion of an immigration judge. See, e.g., La Franca v. INS, 413 F.2d 686 (2d Cir. 1969). In determining whether to grant such a motion, an immigration judge usually considers such factors as, inter alia, administrative convenience, expeditious treatment of the case, the location of the witnesses, and the costs of transporting witnesses or evidence to a new situs. See, e.g., La Franca v. INS, supra, at 689 and n.10; United States ex rel. Mustoras v. McCandless, 61 F.2d 366, 368 (3d Cir. 1932); Calderon et al. v. Moyers, 558 F. Supp. 19 (N.D. Ill. 1982). Thus, attorney Velarde reasonably may have concluded that by conceding deportability he would relieve the Service of its burden of producing the evidence and witnesses needed to prove the respondent's deportability and thereby heighten the chance that the Service would not oppose a change of venue.

In any event, the respondent has not proffered any evidence to show that the admissions and the concession of deportability made on his behalf by counsel Velarde were the result of unreasonable professional judgment or were so unfair that they have produced an unjust result. See Strickland v. Washington, supra. Moreover, the respondent has not offered to testify that the factual admissions and concession of deportability were untrue or incorrect. Since this is the case, we find that the admissions and the concession of deportability were reasonable tactical actions undertaken by Velarde in order to enhance the respondent's chances of securing favorable action on the motion for change of venue and were properly held to be binding upon the respondent. See, e.g., Strickland v. Washington, supra; Magallanes-Damien v. INS, supra; Matter of Z-, 4 I&N Dec. 561, 562-63 (BIA 1951).

The respondent has argued that he should have been allowed to testify that counsel Velarde lacked authorization to concede deportability. This argument misses the point. Since we have found that the concession of deportability was a reasonable tactic designed to enhance the chances that the motion for change of venue would be granted, the issue is not whether the respondent authorized the concession of deportability, but whether the respondent authorized Velarde's attempt to secure a change of venue. Cf. Strickland v. Washington, supra; Rodriguez-Gonzalez v. INS, supra; United States v. Guerra de Aguilera, supra.

As a matter of law, a pleading that has been prepared or filed by an attorney for a party is prima facie regarded as authorized by the party and is entitled to be received into evidence as his admission. E. Cleary, McCormick's Handbook of the Law of Evidence § 265, at 635-36 (2d ed. 1972). It is open to a party to give evidence that a particular pleading was filed upon incorrect information and without his actual knowledge. Id. However, the respondent did not proffer this type of evidence. He did not offer, for instance, to testify that the motion recites untrue information or that counsel Velarde requested a change of venue without the respondent's knowledge and against his wishes. Indeed, without more evidence than that which the respondent proffered, we would find an assertion of the latter type to be incredible, for the record shows that the respondent returned to his home in Houston after being released from the custody of the Service in El Paso, that the motion for change of venue was filed within a short time thereafter, and that during the year between the granting of the change of venue and the commencement of the hearing in Houston, neither the respondent nor his present counsel ever questioned the change of venue. In any event, even if the respondent had proffered evidence to show that the motion for change of venue was filed without his authorization, such evidence would not have caused the motion to be inadmissible. The fact that a pleading was filed by an attorney without his client's knowledge goes only to the weight, and not to the admissibility, of the pleading. Id.

Lastly, the admissibility of the motion for change of venue is not affected by the proffer of testimony that Velarde was representing the respondent only to the extent necessary to secure a reduction in his bond. The respondent has not disputed that Velarde was the respondent's attorney. The bottom portion of Velarde's Form G-28, which the respondent claims he never signed, does not pertain to him, for it relates only to citizens and lawful permanent resident aliens. Thus, the respondent's failure to sign this portion of the form in no way affects the scope of Velarde's representation at the time. Furthermore, under the regulations, there is no "limited" appearance of counsel in immigration proceedings. See 8 C.F.R. §§ 292.1, 292.4, 292.5(a) (1986). Inasmuch as the record shows that Velarde was counsel of record at the time the motion for change of venue was filed, and inasmuch as the respondent's proffer of testimony was to the effect that Velarde had a scope of authority that is not recognized under the regulations, the immigration judge reasonably disregarded this proffer of evidence.

For the foregoing reasons, the respondent's proffer was reasonably denied, and the motion for change of venue was properly admitted into evidence. Once in evidence, the factual admissions and the concession contained in the motion amounted to clear, unequivocal, and convincing evidence of the respondent's deportability and were sufficient to support an order of deportation. Accordingly, the respondent's appeal shall be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

3012

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MATTER OF AMERICAN PARALEGAL ACADEMY, INC.

Request for Recognition

Decided by Board April 28, 1986

(1) "Nominal charges," as set forth in 8 C.F.R. § 292.2(a) (1986), are not defined in terms of specific dollar amounts but have been interpreted to mean a very small quantity or something existing in name only as distinguished from something real or actual.

(2) The applicant, whose charges for services exceed amounts which can be construed as "nominal," may not rely upon the notion that its fees are substantially less than those charged by law firms or that its fees are one of the means by which it is able to fund itself.

(3) The applicant's detailed fee schedule and its statement that it will provide free services as funds become available from contributions suggest that payment is in fact a prerequisite to service; therefore, the applicant's characterization of the amounts it requests in payment for services as "donations" is not persuasive in a determination of "nominal charges."

(4) "Nominal charges," as contemplated by 8 C.F.R. § 292.2(a) (1986), were not intended as a means by which those who are able to pay for assistance help offset the expenses of those who cannot.

BY: Milhollan, Chairman; Dunne, Morris, and Vacca, Board Members

An application, Request for Recognition to Represent before the Board of Immigration Appeals and the Immigration and Naturalization Service (Form G-27), was submitted by American Paralegal Academy, Inc., requesting recognition under 8 C.F.R. § 292.2(a) (1986). The application will be disapproved.

Pursuant to 8 C.F.R. § 292.2(a) (1986), a nonprofit religious, charitable, social service, or similar organization established in the United States may be recognized by the Board of Immigration Appeals. Such an organization must establish to the satisfaction of the Board that it makes only nominal charges, assesses no excessive membership dues for persons given assistance, and has at its disposal adequate knowledge, information, and experience.

Pursuant to 8 C.F.R. § 292.2(b) (1986), an organization seeking recognition must file an application with the Board, along with proof of service of a copy of the application on the appropriate district director. The Service is required by this regulation to review the application and submit to the Board its recommendation for approval or disapproval and the reasons therefor. The Service recommends disapproval of the applicant's request.

The applicant explains that it is an organization which will provide legal counseling services to documented and undocumented aliens in the United States. It also offers paralegal training in order to train and educate American citizens and lawful permanent residents so that they may provide such counseling services. The applicant maintains that it will provide such services free of charge to students and clients who are unable to pay. With respect to its fee policy, the applicant's bylaws state the following:

> The corporation will charge no fees to its students or clients. However, to help cover its expenses, the corporation will ask clients to contribute to their defense at a substantially reduced cost according to the bylaws, and students will be asked to make donations to the corporation to help cover their registration and tuition costs, as is also stated in these bylaws. THE ACADEMY will also request gifts, donations and other contributions from organizations and the public in general. Scholarships and free services will be provided as funds become available from gifts, donations and other contributions from students, clients, organizations and the public in general.

The applicant has submitted a detailed "Donation Schedule" with its request for recognition. This schedule lists charges up to $350 for adjustment of status and asylum applications and for visa petitions. The applicant's submission reflects that such amounts vary according to the client's income and family size. Depending on these factors, a client may pay either no fee, half fee, or the full amount of the stated charge.

The Board has never defined the phrase "nominal charges," as set forth in 8 C.F.R. § 292.2(a) (1986), solely in terms of specific dollar amounts. We have used a case-by-case analysis and have given the word "nominal" its usual and customary meaning; that is, a very small quantity or something existing in name only as distinguished from something real or actual. The fact that an applicant's fees may be substantially less than those charged by law firms is not a proper standard for consideration since such organizations are not law firms. By regulation, recognition is limited to nonprofit religious, charitable, or social service organizations. Moreover, the imposition of nominal fees was not intended as a means through which an organization could fund itself. Applying these principles in the present case, we find that many of the charges stated in the applicant's submission exceed amounts which can be construed as "nominal."

We also find that the applicant's characterization of the amounts it requests in payment for its services as "donations" is not persuasive in a determination of nominal charges. The applicant itself refers to such amounts as "fees" in its "Donation Schedule." Its detailed fee schedule also raises a question as to the voluntary nature of payment and suggests that such contributions are not payable in the client's discretion but rather waivable, if at all, only by the applicant. In fact, the applicant's statement in its submission that free services will be provided to those unable to pay appears contradicted by its bylaws, which state that "free services will be provided as funds become available from gifts, donations, and other contributions from students, clients, organizations, and the public in general." (Bylaws, Article 4, Section 2). Such statement, combined with the applicant's detailed fee schedule, suggests that payment is in fact a prerequisite to service and indicates, at a minimum, that some of the applicant's clients who are financially able may pay the full amount of the fee. The term "nominal charges," as contemplated by 8 C.F.R. § 292.2(a) (1986), was not intended, however, as a means by which those who are able to pay for assistance help off-set the expenses of those who cannot.

Based upon our review of the applicant's submission, we also conclude that it has not demonstrated that it has at its disposal adequate knowledge, information, and experience in immigration law and procedure. The applicant cites legal resources and publications available to it and states that it has access to attorneys and others experienced in immigration matters. We also note that one member of the applicant's Board of Directors was previously an accredited representative of another agency recognized by the Board under 8 C.F.R. § 292.2(a) (1986). It is not clear, however, from the applicant's submission to what extent the experience of these individuals will be available to the applicant or that the expertise of its staff, who will provide assistance to the applicant's clients, is sufficient to warrant recognition.

Because the applicant has not demonstrated that it makes only nominal charges for the services its renders and that it has at its disposal adequate knowledge, information, and experience in immigration law and procedure, the application will be disapproved.

ORDER: The application is disapproved.

3013

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MATTER OF A. DOW STEAM SPECIALITIES, LTD.

In Visa Petition Proceedings

A-27221735

Decided by Commissioner May 21, 1986

In occupational preference visa petition proceedings a petitioner, having no location in the United States, is not an employer and, therefore, cannot offer to permanently employ an alien in the United States. Only a U.S.-based branch office, affiliate, or subsidiary of the foreign organization may file such a petition.

ON BEHALF OF PETITIONER: Gene S. Devore, Esquire
2161 Palm Beach Lakes Blvd.
Suite 301
West Palm Beach, Florida 33409

The petition was denied by the district director, Miami, Florida, and is now before the Commissioner on appeal.

The petitioner in this matter is a Canadian corporation which supplies equipment and provides consulting services for the efficient use of energy. The beneficiary is presently employed in the United States by the petitioner's wholly owned Florida subsidiary, Palm Beach Engineering Specialities, Inc., as its president. A Petition to Classify Nonimmigrant as Temporary Worker or Trainee (Form I-129B) under section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L) (1982), was previously filed by the Florida corporation and approved on the beneficiary's behalf on April 8, 1982, for a 3-year period. The beneficiary was then admitted to the United States as an intracompany transferee. The Canadian corporation now seeks to accord the beneficiary sixth-preference classification in order that he may later become permanently employed with the Florida corporation. Eligibility for labor certification is claimed under 20 C.F.R. § 656.10(d) (1986), commonly referred to as Schedule A, Group IV.

J 21.11/2

The district director held that even though the Canadian and Florida corporations are affiliated, the petitioner cannot offer permanent employment in the United States because its offices are located in Canada and the corporations are two separate entities. In support of his decision, the district director cited Matter of Sun, 12 I&N Dec. 800 (R.C. 1968), and Matter of Thornhill, 18 I&N Dec. 34 (Comm. 1981).

Counsel argues on appeal that the petitioner has satisfied the requirements of section 203(a)(6) of the Act, 8 U.S.C. § 1153(a)(6) (1982).

In Matter of Sun, supra, the regional commissioner held that a sixth-preference visa petition, filed by a petitioner who was an alien against whom an order of deportation was outstanding, was not approvable because the status of the petitioner was not settled or stabilized. Consequently, the offer of employment, which was without any basis of permanency, failed to meet the requirement of section 203(a)(6) of the Act that it be "not of a temporary or seasonal nature."

In Matter of Thornhill, supra, the Commissioner held that a petitioner, who was an alien in an authorized nonimmigrant temporary worker classification, was not competent to create a job offer for the permanent employment of another alien because the petitioner's status was temporary in nature, regardless of the fact that he intended to apply for permanent residence sometime in the future.

Here, the petitioner is not an individual without permanent status in the United States; it is an organization without status in the United States. The petitioner has not been shown to be doing business in the United States. Rather, its subsidiary, Palm Beach Engineering Specialities, Inc., presently employs the beneficiary and conducts business in the United States. It is concluded, therefore, that while Palm Beach Engineering may offer the beneficiary permanent employment in the United States, the foreign-based petitioner may not.

It is noted that the record does not otherwise establish the eligibility of Palm Beach Engineering as a petitioner. For example, its financial solvency has not been demonstrated. Accordingly, we will dismiss this appeal without prejudice to the submission of a new petition by Palm Beach Engineering, accompanied by the requisite supporting documentation.

ORDER: The appeal is dismissed.

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MATTER OF FAITH ASSEMBLY CHURCH

In Visa Petition Proceedings

A-26759846

Decided by Commissioner June 19, 1986

(1) An alien classifiable as a special immigrant pursuant to section 101(a)(27)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(C)(i) (1982), may not be accorded Schedule A, Group III labor certification.

(2) Any minister, who for the previous 2 years has been or will be engaged in part-time ministerial employment involving more than 50 percent of his or her working time, may qualify for Schedule A, Group III labor certification but is precluded from special immigrant classification, which requires the minister to have been and intend to be engaged solely as a minister of a religious denomination.

ON BEHALF OF PETITIONER: Ronald E. Rezac, Esquire
Rezac & Stroud
601 S. Westmoreland Avenue, 2nd Floor
Los Angeles, California 90005

The visa petition, seeking sixth-preference immigrant status on behalf of the beneficiary, was denied by the district director, Los Angeles, California, and is now before the Commissioner on appeal. The appeal will be dismissed.

The petitioner in this matter is a church which proposes to employ the beneficiary as a missionary. The beneficiary, an ordained minister presently serving as a pastor, resides in Seoul, Korea. The petitioner seeks to accord the beneficiary classification pursuant to section 203(a)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1153(a)(6) (1982), and claims eligibility for blanket labor certification pursuant to 20 C.F.R. § 656.10(c) (1986), commonly referred to as Schedule A, Group III.

The district director concluded that the duties of the proposed employment were virtually the same as those normally associated with the occupation of minister. He noted that the Secretary of Labor specifically precluded ministers from Schedule A, Group III classification and denied the petition accordingly.

On appeal, counsel for the petitioner argues that the duties of "missionary" and those of "minister" are distinct and different. Counsel cites the Department of Labor's Dictionary of Occupational Titles, which does not separately list the two occupations but discusses certain duties peculiar to missionaries.

The issues to be resolved are whether the proposed employment is properly classified as that of a minister of religion and whether such employment is excluded from Schedule A, Group III. To decide these issues, analysis of the definition of the term "minister" and relevant Department of Labor regulations and instructions is required.

Although the term "minister" is not defined in the Act, 22 C.F.R. § 42.25(b) (1986) states the following:

> The term "minister," as used in section 101(a)(27)(C) of the Act, means a person duly authorized by a recognized religious denomination having a bona fide organization in the United States to conduct religious worship, and to perform other duties usually performed by a regularly ordained pastor or clergyman of such denomination. The term shall not include a lay preacher not authorized to perform the duties usually performed by a regularly ordained pastor or clergyman of the denomination of which he is a member, and shall not include a nun, lay brother, or cantor.

The Department of Labor's Technical Assistance Guide No. 656 - Labor Certifications (1981), hereinafter called TAG, states at page 10: "Ministers, rabbis, and priests may enter the United States without labor certification if they meet the criteria in Section 101(a)(27)(C)(i) of the Immigration and Nationality Act. Therefore, they are not included in paragraph (1) of Group III."

Section 101(a)(27)(C)(i) of the Act, 8 U.S.C. § 1101(a)(27)(C)(i), provides for admission as a special immigrant of:

> an immigrant who continuously for at least 2 years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States, solely for the purpose of carrying on the vocation of minister of a religious denomination, and whose services are needed by such religious denomination having a bona fide organization in the United States. . . .

The record indicates the beneficiary has been employed as a minister and evangelist for approximately 18 years prior to this application. The job offer requires that the beneficiary possess a bachelor's degree in theology and either 10 years' experience as a minister/pastor or 5 years in a related occupation. The duties of the proposed position are described, in full, as:

> To conduct worship services. To preach the gospel and instruct members of the congregation and prospective converts in the tenets of our religion. To perform wedding, baptismal and death services. To supervise religious educational classes. To counsel those in spiritual need, including the bereaved. To carry the word of God beyond the confines of the church into the community. To provide moral guidance to his flock.

The petitioning organization is predominantly involved in tending to the spiritual needs of the members of its congregation. There is no evidence the duties of the position at issue could be, or have in the past been, performed by other than a minister. Further, the record contains no evidence the beneficiary has performed, in the recent past, or will perform duties which are other than ministerial. We conclude, therefore, that the proposed employment falls within the purview of section 101(a)(27)(C)(i) of the Act and that the beneficiary possesses the requisite experience for such classification.

Having found the beneficiary eligible for classification as a special immigrant, we conclude that the beneficiary is ineligible for Schedule A, Group III labor certification based on the Department of Labor's interpretation of its regulations.

We note, however, that the district director's decision would preclude all ministers from eligibility for Schedule A, Group III labor certification. This is not correct. The TAG, at page 12, states in part regarding Schedule A, Group III:

> The work experience must have been continuous and the alien's primary employment (over 50 percent). Intended employment in the United States must be more than 50 percent of the alien's working time.

Any minister, who for the previous 2 years has been or will be engaged in part-time ministerial employment involving more than 50 percent of his or her working time, may qualify for Schedule A, Group III labor certification but is precluded from special immigrant classification, which requires the minister to have been and intend to be engaged solely as a minister of a religious denomination.

ORDER: The appeal is dismissed.

3015

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MATTER OF PATEL

In Deportation Proceedings

A-26532196
A-26531749

Decided by Board July 11, 1986

(1) The legitimate purpose recognized in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), of protecting the alien's right to appeal by avoiding a forced election between a grant of voluntary departure and the filing of an appeal is not served where, as here, the alien's appeal is determined to be frivolous or filed solely for the purpose of delay.

(2) To the extent that Matter of Chouliaris requires a further order granting voluntary departure in appeals determined to be frivolous or filed solely for the purpose of delay, it is disapproved and is modified to preclude a further grant of voluntary departure where the original grant has expired.

CHARGE:

Order: Act of 1952 - Sec. 241(a)(2) [8 U.S.C. § 1251(a)(2)] - Nonimmigrant - remained longer than permitted (both respondents)

ON BEHALF OF RESPONDENTS:
Marshall M. Taheri, Esquire
5433 Westheimer, Suite 1000
Houston, Texas 77056

ON BEHALF OF SERVICE:
Franklin Bell
General Attorney

BY: Milhollan, Chairman; Dunne, Morris, and Vacca, Board Members

In a decision dated February 6, 1984, an immigration judge found the respondents deportable as charged, concluded that they were not eligible for adjustment of status under section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255 (1982), and granted them the privilege of voluntary departure in lieu of deportation for a period of 6 months, with an alternate order of deportation to India. The respondents have appealed. The appeal will be summarily dismissed pursuant to 8 C.F.R. § 3.1(d)(1-a)(iv) (1986). 1/ The request for oral argument before the Board is denied.

The respondents, a 45-year-old male and his 40-year-old wife, are natives and citizens of India who last entered the United States at Seattle, Washington, on January 13, 1978, as nonimmigrant visitors authorized to remain until February 12, 1978. At their deportation hearing begun on October 24, 1983, and completed on February 6, 1984, the respondents, who were represented by counsel, admitted the factual allegations contained in their respective Orders to Show Cause, Notice of Hearing and Warrant for Arrest of Alien (Form I-221S) and conceded deportability as "overstays" under section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2) (1982). The respondents do not now challenge the finding of deportability and we are satisfied from a review of the record that they received a fair hearing and that their deportability has been established by evidence which is clear, unequivocal, and convincing as required by Woodby v. INS, 385 U.S. 276 (1966).

The respondents' Notice of Appeal (Form I-290A) states only that "[a]ttorney for appellants requests a copy of the transcript of the hearing and exhibits and thirty (30) days from receipt of same to file a written brief." Although indicating that a brief

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1/ The regulation at 8 C.F.R. § 3.1(d)(1-a)(iv) (1986) provides, inter alia, for the summary dismissal of an appeal in any case in which the Board is satisfied, from a review of the record, that the appeal is frivolous or filed solely for the purpose of delay. The provisions of 8 C.F.R. § 3.1(d)(1-a) (1986) are included in the instructions on the reverse side of the Notice of Appeal (Form I-290A), so that every alien who files an appeal has notice of them.

would be submitted in support of their appeal, the respondents have failed to do so. Where, as here, the respondents do not challenge the finding of deportability, have neither requested nor shown eligibility for any form of relief from deportation, and were granted voluntary departure in excess of 30 days, we conclude that the appeal is frivolous or filed solely for the purpose of delay and should therefore be summarily dismissed pursuant to 8 C.F.R. § 3.1(d)(1-a)(iv) (1986). Compare Matter of Valencia, Interim Decision 3006 (BIA 1986) (summary dismissal for failure to adequately specify reasons for the appeal).

In Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), we stated that an alien in deportation proceedings must be assured that he will not risk losing a grant of voluntary departure by filing an appeal from an adverse decision of an immigration judge and that his right to appeal is protected by ensuring the preservation of some period of voluntary departure during the pendency of the appeal. However, Chouliaris did not involve a frivolous appeal or one filed solely for the purpose of delay, and thus the Board was not required to address the effect of such an appeal on a prior grant of voluntary departure by an immigration judge. The legitimate purpose recognized in Chouliaris of protecting the alien's right to appeal by avoiding a forced election between a grant of voluntary departure and the filing of an appeal is not served where, as here, the alien's appeal is determined to be frivolous or filed solely for the purpose of delay.

It was not our intent in Chouliaris to reward an alien whose appeal is determined to be frivolous or filed solely for the purpose of delay with a further grant of voluntary departure. Chouliaris, in fact, specifically modified our prior rule which required the reinstatement of the original period of voluntary departure granted by an immigration judge. See Matter of Villegas Aguirre, 13 I&N Dec. 139 (BIA 1969). Our modification of the rule was premised on its undesirable effect, in some cases, of providing a mechanism to prolong unduly the departure of deportable aliens.

Both this Board and the courts have long recognized the practice, all too frequently adopted by aliens subject to an order of deportation, of employing meritless or dilatory tactics, having no colorable legal or factual basis, solely for the purpose of delaying their departure from the country as long as possible. *See INS* v. *Rios-Pineda*, ____ U.S. ___, 105 S. Ct. 2098 (1985); *Contreras-Aragon* v. *INS*, 789 F.2d 777, (9th Cir. 1986); *Riasati* v. *INS*, 738 F.2d 1115 (10th Cir. 1984); *Der-Rong Chour* v. *INS*, 578 F.2d 464 (2d Cir. 1978), *cert. denied* 440 U.S. 980 (1979); *Ballenilla-Gonzalez* v. *INS*, 546 F.2d 515 (2d Cir. 1976), *cert. denied* 434 U.S. 819 (1977); *Acevedo* v. *INS*, 538 F.2d 918 (2d Cir. 1976); *Panagopoulos* v. *INS*, 434 F.2d 602 (1st Cir. 1970); *Fan Wan Keung* v. *INS*, 434 F.2d 301 (2d Cir. 1970); *Matter of Barocio*, Interim Decision 2992 (BIA 1985); *Matter of Onyedibia*, 15 I&N Dec. 37 (BIA 1974); *Matter of Gamboa*, 14 I&N Dec. 244 (BIA 1972); *Matter of Holguin*, 13 I&N Dec. 423 (BIA 1969); *Matter of Laqui*, 13 I&N Dec. 232 (BIA 1969), *aff'd Laqui* v. *INS*, 422 F.2d 807 (7th Cir. 1970); *Matter of Arao*, 13 I&N Dec. 156 (BIA 1969).

We will no longer sanction the abuse of the appellate procedures authorized under the regulations with a further grant of voluntary departure. To the extent that *Chouliaris* requires a further order granting voluntary departure in appeals determined to be frivolous or filed solely for the purpose of delay, it is disapproved and is modified to preclude a further grant of voluntary departure where the original grant has expired.

Accordingly, the appeal will be summarily dismissed.

ORDER: The appeal is summarily dismissed pursuant to 8 C.F.R. § 3.1(d)(1-a)(iv) (1986).

3016

MATTER OF MARTINEZ-ANGUIANO

IN DEPORTATION PROCEEDINGS

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A24747737

Decided by Board July 8, 1986

(1) The Supreme Court's holding in INS v. Phinpathya, 464 U.S. 183 (1984), may be applied retroactively to cases pending at the time the Court rendered its decision.

(2) The Supreme Court held in INS v. Phinpathya that the continuous physical presence requirement of section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1)(1982), must be literally construed and that any absence from the United States during the 7-year period, however brief, casual, or innocent, breaks the continuity of physical presence required for suspension of deportation; therefore, the Court's decision is not limited to cases where the alien engaged in fraud in order to reenter the United States following a departure.

CHARGE:

Order: Act of 1952 - Sec. 241(a)(2) [8 U.S.C. § 1251(a)(2)] - Entered without inspection

ON BEHALF OF APPLICANT:
Diane R. King, Esquire
225 Broadway, Suite 1500
San Diego, California 92101

ON BEHALF OF SERVICE:
Alan S. Rabinowitz
General Attorney

BY: Milhollan, Chairman; Dunne, Morris, and Vacca, Board Members

In a decision dated February 1, 1984, an immigration judge found the respondent deportable as charged and denied his application for suspension of deportation. The respondent was granted voluntary departure in lieu of deportation. The respondent appealed from the denial of suspension. The appeal will be dismissed.

The respondent is a 30-year-old native and citizen of Mexico who initially entered the United States in September of 1972, without inspection by immigration officials. He was subsequently apprehended and, on July 12, 1983, an Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien (Form I-221S), was issued against him, charging him with deportability under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2) (1982), for an unlawful entry in January of 1978. At his deportation hearing, which commenced on August 15, 1983, and concluded on February 1, 1984, the respondent admitted the allegations in the Order to Show Cause and conceded deportability.

At his hearing, the respondent applied for suspension of deportation. His suspension application reflects that he has departed the United States twice since his initial entry in 1972. The first absence was from December of 1977 to early 1978. The second absence was from December of 1982 to early 1983. The immigration judge concluded that, based on the Supreme Court's decision in INS v. Phinpathya, 464 U.S. 183 (1984), the respondent did not have the 7 years' continuous physical presence in the United States that is required for suspension under section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1)(1982). He therefore denied the application for suspension of deportation.

In INS v. Phinpathya, supra, the Supreme Court held that the continuous physical presence requirement of section 244(a)(1) of the Act must be literally construed and that any absence from the United States during the 7-year period, however brief, casual, or innocent, breaks the continuity of physical presence required for suspension of deportation. In so deciding, the Court rejected not only the liberal view of the requirement set forth by the United States Court of Appeals for the Ninth Circuit in Kamheangpatiyooth v. INS, 597 F.2d 1253 (9th Cir. 1979), 1/ and Phinpathya v. INS, 673 F.2d 1013 (9th Cir. 1981), rev'd, INS v. Phinpathya, supra, but rejected as well the idea that the continuous physical

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1/ In Kamheangpatiyooth v. INS, supra, the court of appeals held that an alien's absences from the United States during the 7 years preceding his application for suspension of

(cont'd)

presence requirement could admit of any exceptions. See generally Wadman v. INS, 329 F.2d 812 (9th Cir. 1964); Matter of Wong, 12 I&N Dec. 271 (BIA 1967). On appeal, the respondent, through counsel, argues that the Phinpathya decision should not be applied retroactively. He asserts that, if the decision in Phinpathya is applied prospectively only, he will not be barred by it from meeting the 7 years' continuous physical presence requirement. He also contends in his brief on appeal that in a case like his, where his absences from the United States were brief, casual, and innocent, "a hypertechnical interpretation [of the continuous physical presence requirement] should not be employed."

The Supreme Court's decision in Phinpathya is dispositive of this case, despite the fact that the decision was rendered after the respondent's absences from the United States. The Ninth Circuit, where this case arises, has specifically rejected the argument that retroactive application of the Phinpathya decision violates due process. Bagues-Valles v. INS, 779 F.2d 483 (9th Cir. 1985). In so ruling, the court of appeals pointed out that the Phinpathya ruling was itself retroactive, in that it applied its literal reading of the continuous physical presence requirement to Phinpathya's prior departure from the United States. The argument that Phinpathya should only apply prospectively has also been specifically rejected by the Fifth Circuit. Moreno-Alaniz v. United States INS, 781 F.2d 1054 (5th Cir. 1986). The ruling in Phinpathya has in fact consistently been applied, both in

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deportation would not meaningfully interrupt his continuous physical presence here and thus would not render him ineligible for suspension,

> if indications are that the hardship of deportation to the alien would be equally severe had the absence not occurred, and that no significant increase in the likelihood of deportation could reasonably have been expected to flow from the manner and circumstances surrounding the absence.

Id. at 1257.

published and unpublished decisions, to cases which were pending at the time the Supreme Court rendered its decision, usually without discussion of whether the decision should be applied retroactively. *See, e.g.*, *Sanchez-Dominguez* v. *INS*, 780 F.2d 1203 (5th Cir. 1986); *Moreno* v. *United States INS*, 779 F.2d 1086 (5th Cir. 1986); *Dasigan* v. *INS*, 743 F.2d 628 (9th Cir. 1984). This Board also has applied the holding retroactively, without discussion of the retroactivity issue. *Matter of Dilla*, Interim Decision 2962 (BIA 1984).

The respondent's appeal also suggests that his case should be distinguished from *Phinpathya* because in *Phinpathya* the alien engaged in fraud in order to obtain a nonimmigrant visa with which to reenter the United States following an absence, whereas here, the respondent's absences and reentries were "innocent." This argument must be rejected. The Court's holding in *Phinpathya* was basic and simple: the continuous physical presence requirement of section 244(a)(1) of the Act is inflexible, admits of no exceptions, and, however severe the consequences, the alien must have been continuously present in this country for at least 7 years in order to be eligible for suspension of deportation. The Court did not in any way suggest that an exception might be made for an alien who departed the country within the 7 years but was readmitted lawfully, or who, like the respondent herein, reentered without inspection but did not engage in fraud. Given the clear language used in the decision, we have no difficulty in concluding that the ruling in *INS* v. *Phinpathya*, *supra*, is not limited to cases where the alien engaged in fraud in order to reenter the United States following a departure. Indeed, we have already applied *Phinpathya*, in a precedent decision, to a case not involving fraud. *Matter of Dilla*, *supra*. The courts also have applied the ruling to such cases. *See* *Moreno-Alaniz* v. *United States INS*, *supra*; *Sanchez-Dominguez* v. *INS*, *supra*; *Moreno* v. *United States INS*, *supra*; *Baques-Valles* v. *INS*, *supra*; *Dasigan* v. *INS*, *supra*.

Inasmuch as the respondent did not satisfy the statute's continuous physical presence requirement, we shall dismiss his appeal on that ground. We therefore find it unnecessary to address his contentions regarding extreme hardship.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

3017

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MATTER OF SILVER DRAGON CHINESE RESTAURANT

In Visa Petition Proceedings

A-24551321

Decided by Commissioner August 13, 1986

(1) An occupational preference petition may be filed on behalf of a prospective employee who is a shareholder in the corporation. The prospective employee's interest in the corporation, however, is a material fact to be considered in determining whether the job being offered was really open to all qualified applicants.

(2) A shareholder's concealment, in labor certification proceedings, of his or her interest in the petitioning corporation constitutes willful misrepresentation of a material fact and is a ground for invalidation of an approved labor certification under 20 C.F.R. § 656.30(d) (1986).

ON BEHALF OF PETITIONER: Harry A. DeMell, Esquire
277 Broadway
New York, New York 10007

I. PROCEDURAL HISTORY AND JURISDICTION

The petition was denied by the district director, Newark. The petitioner appealed that decision, whereupon, in consideration of new evidence submitted on appeal, we formulated a new ground of denial and dismissed the appeal. The petitioner, citing various authorities, now advances the proposition that our action was incorrect and exceeded the scope of our authority. We will grant the petitioner's motion pursuant to 8 C.F.R. § 103.5 (1986) in order to permit examination of its new arguments and citations.

II. FACTS

The petitioner is a Chinese restaurant which proposes to offer the beneficiary permanent employment as a cook of Chinese-style

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food. Labor certification for the position at issue was applied for by the petitioning employer on February 23, 1981, and was granted on June 12, 1981. The petitioning employer is a New Jersey corporation. In its application for labor certification the petitioner certified that the position at issue was open to any qualified United States worker. The beneficiary was identified as a chef who would be supervised by the president of the petitioner, an individual identified as Julio Malqui. Julio Malqui signed the application for labor certification in his capacity as the petitioner's president. The district director denied the petition upon determining that the petitioner had not satisfactorily demonstrated its ability to compensate the beneficiary as stipulated in the labor certification application. On appeal the petitioner submitted a copy of the petitioner's 1983 corporate income tax return in order to rebut the district director's determination. Our review of this document revealed the beneficiary to be listed as the owner of 50 percent of the petitioner's issued shares. The tax return was signed by the beneficiary as the petitioner's president, and not by Malqui. Unsigned photocopies of the petitioner's 1981 and 1982 corporate income tax returns are also of record. The 1981 return, which covers the period during which application for labor certification signed by Malqui was made and approved, lists the beneficiary as the sole officer of the petitioning corporation. The 1982 return lists the beneficiary and Julio Malqui as owners of 50 percent of the petitioner's issued shares each but shows the beneficiary to have been the sole party at interest to derive compensation (in the amount of $10,400) from the petitioner, with Malqui having gone uncompensated. An identical situation, including the amount of compensation to the beneficiary, is reflected in the 1983 return. The 1982 return shows the beneficiary to have devoted 100 percent of his work time to the petitioner, and Malqui none. No information is provided concerning work time in the 1983 return.

In light of the fact that the beneficiary is a principal of the petitioning corporation as well as its president, it is evident that information contained in the labor certification is incorrect in two regards. First, the beneficiary is not, in fact, supervised by Mr. Malqui, who signed the petition as president.

Second, the job was not actually open to qualified United States citizen or resident workers. We conclude that misrepresentation, both willful and material, occurred. This conclusion is supported by a Department of Labor advisory opinion, dated May 10, 1984:

> It is the position of the Department of Labor that while it is not an absolute ground for denial of an application for certification, the alien's ownership of his/her potential corporate employer should cause the certifying officer to examine more carefully whether the job opportunity is clearly open to qualified U.S. workers, and whether U.S. workers applying for the job were rejected solely for lawful job-related reasons.
>
> The alien's ownership of his/her non-corporate employer; e.g., partnership, would be one ground for denial of a labor certification, since it would not constitute work for an employer other than oneself, as required by the regulations. 20 CFR 656.50, "Employment."

In light of the materiality and apparent willfulness of the petitioner's misrepresentations, we invalidated the labor certification at issue pursuant to the provisions of 20 C.F.R. § 656.30(d) (1986) and dismissed the appeal. While the district director was correct in considering the petitioner's financial conditions, we said that he should have invalidated the labor certification. The petitioner's misrepresentation of its true relationship with the beneficiary is a far more fundamental impediment to accordance of the benefit sought than is the Government's adverse opinion of the petitioner's substantiality or viability.

III. THE PETITIONER'S MOTION

The petitioner, on motion, argues two issues. First, relying on Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980), counsel argues that the beneficiary's stock ownership does not preclude eligibility for the benefit sought.

Second, counsel argues that the labor certification can be invalidated only upon finding fraud or willful misrepresentation and that the Department of Labor's conclusion that a good faith recruitment effort was made precludes such a finding.

IV. THE EFFECT OF THE PETITIONER'S ORGANIZATION AS A CORPORATION

The Department of Labor advisory opinion quoted above has since been buttressed by like holdings in administrative and judicial proceedings. See, e.g., Pasadena Typewriter and Adding Machine Co. v. Department of Labor, No. 83-5516 AAH (T) (C.D. Cal. Feb. 17, 1984); Help Trucking Co. ex. rel. Rodriguez, 6 ILCR 1-453 (1984); H.D.S. International Corp. ex. rel. Hamidzadah, 3 ILCR 1-1044 (1982).

The petitioner's first point is substantially correct as quoted. The fact that an alien is a stockholder in the corporation seeking to employ him or her in the United States does not constitute an automatic disqualification. Cohen-Verdi, Inc., 5 ILCR 1-406 (1982); Matter of Aphrodite Investments Limited, supra; Matter of M-, 8 I&N Dec. 24 (BIA, A.G. 1958). However, the fact that a corporation is an entity distinct from its stockholders does not, as noted in Pasadena Typewriter and Adding Machine Co. v. Department of Labor, supra, inevitably or automatically establish a corporation's independence of particular stockholders. As is evident from the administrative case law cited above, the Department of Labor has in the past denied labor certification in instances where it determined that the prospective alien employee controlled the prospective corporate employer to the extent that the job offer at issue could not properly be regarded as open to all qualified applicants.

A prospective immigrant's control of the petitioning corporation does not act to disqualify him or her in any automatic fashion if it can be established that the position at issue was offered in good faith and open to all qualified applicants. Where, as in this instance, an alien beneficiary's association with the petitioning corporation is concealed in labor certification proceedings, the Department of Labor is prevented from discharging its function of "examin[ing] more carefully whether the job opportunity is clearly open to qualified U.S. workers, and whether U.S. workers applying for the job were rejected solely for lawful job-related reasons." Department of Labor advisory opinion, supra.

V. THE EFFECT OF THE PETITIONER'S WILLFUL MISREPRESENTATION

The labor certification application at issue is signed by an individual other than the beneficiary, despite the fact that the petitioner's corporation income tax return shows the beneficiary to have been the sole officer of the corporation during the period when the application was submitted. The beneficiary is petitioned for in the capacity of "cook, Chinese-type food" when in fact he is an officer of the petitioning corporation. The beneficiary is represented to be subject to the supervision of the president of the petitioning corporation when he actually is the president of the petitioning corporation. These are obvious misrepresentations that relate to matters of fact, material to the labor certification proceeding in which they were made. They are determined to be willful because the officers and principals of a corporation are presumed to be aware and informed of the organization and staff of their enterprise. Under the clear language of applicable regulations the labor certification before us is subject to invalidation. The petitioner's characterization of the grounds for invalidation of the labor certification as "mere suspicion" of fraud is belied by the facts.

In this case, the misrepresentation which occurred consists of an obvious mischaracterization of the beneficiary's relationship to the petitioner, which had the effect of the issuance of a labor certification that would not otherwise have been granted (see the Department of Labor advisory opinion below). The misrepresentation which occurred cannot be dismissed by the petitioner or prudently regarded by us as an innocent, non-willful omission of material facts which would not subject the labor certification before us to invalidation. Rather, the petitioner's statement that the beneficiary would be supervised by its corporate president, when the beneficiary, at the time the statement was made, was in fact the president of the petitioning corporation can only be held to be a misrepresentation calculated to secure a benefit for which the petitioner was not eligible, and thus a misrepresentation which properly subjects the labor certification to invalidation under 20 C.F.R. § 656.30(d) (1986).

The Department of Labor concurs in this determination. In an advisory opinion concerning this case, dated November 18, 1985, the Chief of the Division of Foreign Labor Certification states as follows:

> Based on the above facts there appears to have been a misrepresentation of a material fact involving a labor certification. The signing of Part A of the labor certification by Julio Malqui as the president and supervisor of the alien when in fact he was not employed by the petitioning corporate employer caused the Certifying Officer not to inquire as to the extent of the control the alien exercised over the petitioning corporate employer. This information would have been necessary for the Certifying Officer to determine whether the job opportunity was clearly open to qualified U.S. workers.
>
> As a result of the case _Pasadena Typewriter and Adding Machine Company, Inc. and Alireza Rahmaty_ v. _United States Department of Labor (CV 83-5516-AAH(T)_, a statement of the Department's position regarding those cases where the alien beneficiary is a principal stockholder of the petitioning corporate employer filing an _Application for Alien Labor Certification_ on his behalf was recently provided to the American Immigration Lawyers Association Committee on Labor Liaison. This was somewhat a fuller statement than was contained in my February 26, 1985, letter to you, and is reproduced below for your information.
>
> The Department's policy with regard to those situations where the beneficiary of the labor certification is a principal stockholder in the petitioning corporate employer, has been that while it is not an

absolute ground for denial of an application for certification, the alien's ownership of his potential corporate employer should cause the certifying officer to examine more carefully whether the job opportunity is clearly open to qualified U.S. workers (20 CFR 656.20(C)(8)), and whether U.S. workers applying for the job were rejected solely for lawful job-related reasons (20 CFR 656.21(b)(7)). The case Pasadena Typewriter is in accord with the Department's policy. As stated by the court on page 7 of its decision:

> "The regulations require a 'job opportunity' to be 'clearly open'. Requiring the job opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring that the job opportunity be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20."

VI. THE DIVISION OF AUTHORITY

Although the decision to grant or withhold labor certification is reserved to the Secretary of Labor and his designees, the authority to invalidate labor certifications is vested by Department of Labor regulation solely in the Department of State and this Service. Further, the case law relating to the division of authority between the Department of Labor and this Service has advanced considerably beyond its condition at the time when the citations utilized by the petitioner were rendered. For example, examination of a beneficiary's qualifications, though not beyond the scope of authority of the Department of Labor, is normal and properly conducted by this Service. Madany v. Smith, 696 F.2d 1008 (D.C. Cir. 1983); Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey, 661 F.2d 1 (1st Cir. 1981). For

current construction of related issues see, e.g., K.R.K. Irvine, Inc., v. Landon, 699 F.2d 1006 (9th Cir. 1983); Joseph v. Landon, 679 F.2d 113 (7th Cir. 1982); Ubeda v. Palmer, 539 F. Supp. 647 (N.D. Ill. 1982).

VII. CONCLUSION

Based on the facts and the weight of authority, and after consultation with the Department of Labor as to this matter, we will reaffirm our previous order.

ORDER: Our order of June 18, 1984, is hereby affirmed. The petition remains denied.

3018

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MATTER OF GARCIA

In Exclusion Proceedings

A-22759530

Decided by Board August 25, 1986

(1) An alien conditionally admitted to the United States as a refugee under section 207 of the Immigration and Nationality Act, 8 U.S.C. § 1157 (1982), has not been paroled pursuant to section 212(d)(5) of the Act, 8 U.S.C. § 1182(d)(5) (1982).

(2) The sole basis for terminating the status of an alien admitted to the United States as a refugee under section 207 of the Act is a determination that he was not a refugee within the meaning of section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42) (1982), at the time of his admission.

(3) Absent the proper termination of his status, an alien who has been admitted as a refugee under section 207 of the Act may not be placed in exclusion proceedings until there has been a prior determination that such alien is inadmissible, following his examination under oath by an immigration officer.

EXCLUDABLE: Act of 1952 - Sec. 212(a)(9) [8 U.S.C. § 1182(a)(9)]-
Crime involving moral turpitude

ON BEHALF OF APPLICANT:
Pro se

ON BEHALF OF SERVICE:
Charles R. Kulaxsa
Acting General
Attorney

BY: Milhollan, Chairman; Dunne, Morris, Vacca, and Heilman, Board Members

In a decision dated February 11, 1981, an immigration judge terminated the exclusion proceedings and certified his decision to the Board pursuant to 8 C.F.R. § 3.1(c) (1981). The decision will be affirmed as modified.

The applicant is a 39-year-old native and citizen of Cuba, who was admitted to the United States at Miami, Florida, on June 28, 1980, as a refugee pursuant to section 207 of the Immigration and Nationality Act, 8 U.S.C. § 1157 (1982). He was convicted in the State of Texas on January 31, 1981, of burglary of a vehicle and was sentenced to 3 years in prison. Imposition of sentence was suspended, and the applicant was placed on probation for a period of 3 years. At his exclusion hearing on February 11, 1981, the applicant was served with written notice dated February 4, 1981, that his parole status, authorized under section 212(d)(5) of the Act, 8 U.S.C. § 1182(d)(5) (1982), was terminated pursuant to 8 C.F.R. § 212.5(b) (1981) based on his conviction. He was also served at that time with a Notice to Applicant for Admission Detained for Hearing before Immigration Judge (Form I-122) dated February 11, 1981, indicating that he was being detained for a hearing to determine his possible excludability under section 212(a)(9) of the Act.

The immigration judge found that the applicant had not been paroled pursuant to the provisions of section 212(d)(5) of the Act but had been admitted as a refugee under section 207 of the Act. He reasoned that the applicant was not, therefore, an applicant for admission seeking entry to the United States in accordance with sections 235, 236, and 237 of the Act, 8 U.S.C. §§ 1225, 1226, and 1227 (1982). The immigration judge concluded that he was without jurisdiction to proceed and terminated the exclusion proceedings. While we do not agree with his reasons, we find the immigration judge's termination of the proceedings proper.

By the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, Congress replaced the "conditional entrant" status for refugees under former section 203(a)(7) of the Act, 8 U.S.C. § 1153(a)(7) (1976), with sections 207, 208, and 209 of the Act, 8 U.S.C. §§ 1157, 1158, and 1159 (1982), which provided for conditional admission of all refugees entering the United States, deferred their inspection and examination by the Service, and subjected such aliens found inadmissible to exclusion proceedings in accordance with the provisions of sections 235, 236, and 237 of the Act. We note that in providing that all refugees entering the United States be admitted conditionally, Congress specifically rejected the provisions in the Senate's version of the Refugee Act which would have admitted refugees entering the United States as lawful permanent residents. S. Rep. No. 256, 96th Cong., 1st Sess. 4, 7-10, 15-18, reprinted in 1980 U.S. Code Cong. and Ad. News 141, 144, 147-150, 155-158; H.R. Rep. No. 781, 96th Cong., 2d Sess. 19, 21, reprinted in 1980 U.S. Code Cong. and Ad. News 160, 162.

We conclude that the applicant's "admission" as a refugee under section 207(c)(1) of the Act was conditional and that, upon the proper termination of his status as a refugee or the determination that he was not admissible, following his examination under oath by an immigration officer, the applicant would properly be subject to exclusion proceedings in accordance with sections 235, 236, and 237 of the Act. Sections 207(c)(4), 209(a)(1) of the Act; 8 C.F.R. §§ 207.8, 209.1 (1986). We are satisfied, however, from a review of the record that the applicant was not properly placed in exclusion proceedings. There is no evidence that the applicant's status as a refugee was terminated in accordance with the Act and regulations or that he was determined to be inadmissible following his examination under oath by an immigration officer.

The sole basis for terminating the status of an alien, such as the applicant, who was admitted to the United States as a refugee under section 207 of the Act, is a determination that he was not a refugee within the meaning of section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42) (1982), at the time of his admission. Section 207(c)(4) of the Act provides:

> The refugee status of any alien (and of the spouse or child of the alien) may be terminated by the Attorney General pursuant to such regulations as the Attorney General may prescribe if the Attorney General determines that the alien was not in fact a refugee within the meaning of section 101(a)(42) at the time of the alien's admission.

The regulation at 8 C.F.R. § 207.8 (1986), which implements the provisions of section 207(c)(4), provides:

> The refugee status of any alien (and of the spouse or child of the alien) admitted to the United States under section 207 of the Act shall be terminated by any district director in whose district the alien is found if the alien was not a refugee within the meaning section 101(a)(42) of the Act at the time of admission. The district director shall notify the alien in writing of the Service's intent to terminate the alien's refugee status. The alien shall have 30 days from the date notice is served upon him/her or, delivered to his/her last known address, to present written or oral evidence to show why the alien's refugee status should not be terminated. There is no appeal under this chapter from the termination of refugee status by the district director. Upon termination of refugee status, the district director shall process the alien under sections 235, 236, and 237 of the Act.

The Service's written notice to the applicant contained in the record purporting to terminate his status is both factually inaccurate and legally deficient. It states that the applicant was paroled into the United States under section 212(d)(5) of the Act and that his parole status is being terminated in accordance with 8 C.F.R. § 212.5(b) (1981) 1/ based on his conviction for a serious misdemeanor or felony. The applicant was admitted as a refugee under section 207(c)(1) of the Act and not paroled into the United States under section 212(d)(5). The applicant's subsequent conviction for burglary in this country does not provide a basis for terminating his refugee status under section 207 of the Act. Moreover, the applicant was served with the notice at the time of his exclusion hearing. He was not provided with the 30 days' written notice of intent to terminate his status required by 8 C.F.R. § 207.8 (1986). We conclude that the applicant's status as a refugee under section 207 of the Act has not been terminated.

1/ Termination of parole is presently authorized under 8 C.F.R. § 212.5(d) (1986).

Absent the proper termination of his status, an alien who has been admitted as a refugee under section 207 of the Act may not be placed in exclusion proceedings until there has been a prior determination that such alien is inadmissible, following his examination under oath by an immigration officer. Section 209(a)(1) of the Act provides:

> Any alien who has been admitted to the United States under section 207 -
>
> (A) whose admission has not been terminated by the Attorney General pursuant to such regulations as the Attorney General may prescribe,
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> (B) who has been physically present in the United States for at least one year, and
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> (C) who has not acquired permanent resident status,
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> shall, at the end of such year period, return or be returned to the custody of the Service for inspection and examination for admission to the United States as an immigrant in accordance with the provisions of sections 235, 236, and 237.

The regulation at 8 C.F.R. § 209.1(a)(1) (1986) provides:

> Every alien in the United States as a refugee under section 207 of this chapter whose status has not been terminated, is required to appear before an immigration officer one year after entry to determine his/her admissibility under sections 235, 236, and 237 of the Act. The applicant shall be examined under oath to determine admissibility. If the applicant is found to be admissible, he/she shall be inspected and admitted for lawful permanent residence as of the date of the alien's arrival in the United States. If the applicant is determined to be inadmissible, he/she shall be informed that he/she may renew the request for admission to the United States as an immigrant in

> exclusion proceedings under section 236 of the Act. The provisions of this section shall provide the sole and exclusive procedure for adjustment of status by a refugee admitted under section 207 of the Act, whose application is based on his/her refugee status.

There is no evidence that the applicant was examined under oath by an immigration officer or determined to be inadmissible prior to being placed in exclusion proceedings. The record reflects that the applicant was served with the original Form I-122 at the time of his hearing on February 11, 1981, and that the notice was prepared on the same date. We are satisfied that the requirements of section 209(a)(1) of the Act and 8 C.F.R. § 209.1(a)(1) (1986) were not complied with in this case. 2/

We conclude that the provisions of the Act and regulations pertaining to an alien admitted as a refugee under section 207 of the Act were not followed. See Matter of O, et al., 16 I&N Dec. 344 (BIA 1977). The applicant's status as a refugee has not been terminated, nor has the applicant been examined under oath by an immigration officer and determined to be inadmissible. Accordingly, we find that the exclusion proceedings were improperly instituted.

ORDER: The decision of the immigration judge is affirmed as modified.

2/ We note that section 207(c)(3) of the Act and 8 C.F.R. § 207.3(b) (1986) provide that the exclusionary grounds contained in section 212(a) of the Act, with certain exceptions not relevant here, may be waived for an alien admitted as a refugee under section 207 of the Act. Consideration of such waivers, in the first instance, is appropriately part of the examination of the alien under oath by an immigration officer provided for in 8 C.F.R. § 209.2(a)(1) (1986).

30/19

MATTER OF HARRY BAILEN BUILDERS, INC.

In Visa Petition Proceedings

A-36942537

Decided by Commissioner August 27, 1986

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A labor certification issued by the Department of Labor applies only to a specific job opportunity. When the job offer is filled by the arrival of an alien or for any other reason, the job offer ceases to exist. Therefore, an alien who abandons residence after being admitted for permanent residence to take up the certified job offer cannot use the same labor certification again.

ON BEHALF OF PETITIONER: Dennis M. Clare, Esquire
J. Gregory Clare, Esquire
Fifth Floor, Hart Block Building
730 West Main Street
Louisville, Kentucky 40202

This matter is before the Commissioner on certification pursuant to 8 C.F.R. § 103.4 (1986). The decision of the district director, New Orleans, will be affirmed.

The petitioner, Harry Bailen Builders, Inc., is a construction company which seeks to accord the beneficiary sixth-preference classification as a roofer. The beneficiary was previously admitted to the United States as a sixth-preference immigrant on October 15, 1980, on the basis of a like visa petition filed by the petitioner. The beneficiary abandoned his residence in the United States in May 1981 and sought to reimmigrate based on the original labor certification and visa petition. He was advised by a consular officer that he must reapply and follow the same procedure he did in 1979. The petitioner nevertheless seeks approval of a new petition, utilizing the individual labor certification issued on February 13, 1980, and restoration of the beneficiary's original priority date. The petitioner explains that the position offered is identical to the position previously held and that a Service employee advised the petitioner's officers that it is not necessary to obtain a new labor certification because the original certification remains valid.

The district director cited the applicable statutes and regulations and concluded that the labor certification became a part of the original visa petition filed in April 1980. Since the beneficiary had already used the petition to immigrate to the United States, the district director determined that the visa petition, and thus the labor certification, cannot be restored. See 8 C.F.R. § 204.4(f) (1986). The district director found that, absent a new labor certification, he was unable to approve the petition pursuant to 8 C.F.R. § 204.1(d)(1) (1986) and denied it accordingly.

Counsel argues that the labor certification issued in 1980 is, in accordance with 20 C.F.R. §§ 656.30(a) and (d) (1986), valid indefinitely and may only be invalidated where a determination of fraud or willful misrepresentation of a material fact involving the labor certification has been made. Counsel submits on appeal that the visa petition should be approved using the 1980 labor certification but that the new petition should be accorded a priority date as of the date the new petition was filed.

There are three issues to be resolved in this case: (1) whether the labor certification remained valid after it was used by the beneficiary to immigrate to the United States; (2) whether or not the new petition can convey the same priority date as the original petition; and, if not, (3) whether the new petition can convey a priority date as of the date it was filed.

On February 23, 1982, the Associate Commissioner, Examinations, advised the Chief, Division of Labor Certifications, United States Employment Service, Department of Labor, that the Service had recently clarified its regulations regarding the use and validity of a visa petition which has been successfully used to obtain permanent resident status. The Service regulation at 8 C.F.R. § 204.4 (1986) had been amended to add paragraph (f), specifying that the petition ceases to convey a priority date or visa classification after it has been successfully used to obtain residence. The Associate Commissioner questioned whether a labor certification continues to be valid under these circumstances.

On April 6, 1982, the Chief responded, stating that "[t]he labor certification issued by the Department of Labor applies to a particular job, not to an alien. When the job offer is filled by the arrival of an alien or for any other reason, the job offer would no longer exist. It follows, therefore, that the labor certification could not be used again after the lawful admission of an alien for permanent residence to take up the certified job offer."

The Department of Labor's regulations state at 20 C.F.R. § 656.30(c)(2) (1986) that "[a] labor certification involving a specific job offer is valid only for the particular job opportunity and for the area of intended employment stated on the Application for Alien Employment Certification form."

The Employment and Training Administration's Technical Assistance Guide No. 656 - Labor Certifications, states on page 104 of the 1981 publication that certain limitations are placed on labor certifications granted in Schedule A and non-Schedule A occupations:

> A non-Schedule A labor certification is limited to the specific job opportunity, the alien for whom the certification was granted, and the area of intended employment stated on the application. If any of these factors change, a new labor certification is generally required. (Emphasis added.)

In this instance, the labor certification issued in 1980 was limited to the job opportunity offered on November 7, 1979 (the date the original Application for Alien Employment Certification was accepted for processing by the Secretary of Labor's designated representative). That specific opportunity ceased to exist when the beneficiary immigrated and became employed by the petitioner. The job opportunity offered in the present proceeding is an altogether different opening, approximately 5 years later than the date the beneficiary was employed in the original job opening.

We do not find that the petitioner is exempted from a new labor certification merely because it wishes to employ the same beneficiary in the same occupation at the same geographical location after he has previously been admitted to the United States for lawful permanent residence and abandoned that status.

Thus, the labor certification issued on February 13, 1980, cannot be used again to accommodate the admission of the beneficiary as a preference immigrant under section 203(a)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1153(a)(6) (1982). Without a new labor certification issued in accordance with section 212(a)(14) of the Act, 8 U.S.C. § 1182(a)(14) (1982), or evidence that the beneficiary is entitled to labor precertification under 20 C.F.R. § 656.10 (1986) (Schedule A), the visa petition cannot be approved and a new priority date cannot be accorded.

As the district director correctly found, the beneficiary's priority date conveyed by the original petition cannot be restored. This would be contrary to the plain meaning of Title 8, Code of Federal Regulations, Section 204.4(f) (1986) which provides:

> Exception to revalidation. Any petition approved under section 204(b) of the Act ceases to convey a priority date or visa classification, and cannot be restored after it has been used by a beneficiary to obtain either an adjustment of status to lawful permanent resident or admission as an immigrant to lawful residence based upon a consular immigrant visa.

Should the petitioner obtain a new labor certification for the beneficiary, a petition filed thereafter would have a priority date as of the date the new labor certification was accepted for processing.

ORDER: The decision of the district director is affirmed.

3020

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MATTER OF GARCIA

In Visa Petition Proceedings

A-26285801

Decided by Board September 9, 1986

(1) In order to accord preference status to the beneficiary as his unmarried son under section 203(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(a)(2) (1982), a petitioner must establish that the beneficiary qualified as his "child" within the meaning of section 101(b)(1) of the Act, 8 U.S.C. § 1101(b)(1) (1982).

(2) Under the New Jersey Parentage Act, effective May 21, 1983, all children and parents have equal rights with respect to each other regardless of the marital status of the parents. N.J. Stat. Ann. §§ 9:17-38 to-59 (West 1983). Matter of Clarke, 18 I&N Dec. 369 (BIA 1983), modified.

(3) To qualify as a legitimated "child" under section 101(b)(1)(C) of the Act, a beneficiary must be under 21 years of age and must have been legitimated before reaching the age of 18 years.

(4) Where the petitioner seeks to establish that the beneficiary was legitimated under the New Jersey Parentage Act within the meaning of section 101(b)(1)(C) of the Act, he must prove that he had a residence or domicile in New Jersey prior to the beneficiary's 18th birthday.

ON BEHALF OF PETITIONER:
Hedi Framm Montesinos, Esquire
2447 Mission Street
San Francisco, California 94104

ON BEHALF OF SERVICE:
Edward Weiss
General Attorney

BY: Milhollan, Chairman; Dunne, Morris, Vacca, and Heilman, Board Members

The lawful permanent resident petitioner applied for preference status for the beneficiary as his unmarried son under section 203(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(a)(2) (1982). In a decision dated June 10, 1986, the Regional Adjudication Center (RAC) director denied the petition but certified his decision to the Board for review. The record will be remanded for further proceedings.

The beneficiary is a 20-year-old native and citizen of El Salvador who was born out of wedlock on June 1, 1966. The petitioner is a 57-year-old native and citizen of El Salvador who became a lawful permanent resident of the United States on June 9, 1980. He now resides in New Jersey. The petitioner filed a visa petition on behalf of the beneficiary on March 16, 1986.

A birth certificate submitted with the visa petition reflects that the beneficiary is the natural son of the petitioner. The record further reflects that the beneficiary's natural parents never legally married.

The RAC director noted in his decision that the Board has held that under the law of El Salvador, the beneficiary's legal residence and domicile, a child must be acknowledged and the natural parents must marry in order for the child to be legitimated by operation of law. See Matter of Ramirez, 16 I&N Dec. 222 (BIA 1977). The RAC director further noted that the Board held in Matter of Clarke, 18 I&N Dec. 369 (BIA 1983), that under the law of New Jersey, the petitioner's legal residence and domicile and the state where the visa petition was filed, the subsequent marriage of the child's natural parents was necessary for legitimation to take place. The RAC director correctly stated, however, that subsequent to the Board's decision in Matter of Clarke, supra, the State of New Jersey repealed the sections relied upon in that decision and adopted the Uniform Parentage Act, effective May 21, 1983. The RAC director denied the visa petition, noting that he was bound by the Board's precedent decision in this matter, but certified the case for our review for a determination on the effect of the change of law in New Jersey.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefits sought. Matter of Brantigan, 11 I&N Dec. 493 (BIA 1966). In order to qualify as the petitioner's son, the beneficiary must at one time have been the petitioner's child within the definition of section 101(b)(1) of the Act, 8 U.S.C. § 1101(b)(1) (1982). Matter of Coker, 14 I&N Dec. 521 (BIA 1974).

Under section 101(b)(1) of the Act, a person may qualify as a "child" within the context of the immigration laws only where the parent-child relationship exists by reason of any of the circumstances set forth in section 101(b)(1). The term "child," as defined in that section, does not include illegitimate children not claiming an immigration status by virtue of their relationship to their mother under section 101(b)(1)(D). The child must either be legitimate under section 101(b)(1)(A) or legitimated in accordance with section 101(b)(1)(C) of the Act, which includes within its provisions:

> a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, wehther in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.

In the present case, the beneficiary was born out of wedlock. Therefore, it must be established that he was either deemed legitimate or legitimated under the law of El Salvador or New Jersey. In Matter of Clarke, supra, we referred to sections 9:15-1 and 9:15-2 of the New Jersey Statutes Annotated and found that legitimation of a child born out of wedlock required the marriage of the child's natural parents. However, these sections were repealed and the New Jersey Parentage Act was subsequently invoked on May 21, 1983. The New Jersey Parentage Act of 1983 reflects that, regardless of the marital status of the parents, all children and parents have equal rights with respect to each other. See N.J. Stat. Ann. §§ 9:17-38 to-59 (West 1983). Accordingly, our decision in Matter of Clarke, supra, is modified insofar as it applies to New Jersey legitimation law. Hence, we now hold that a child who was born in New Jersey on or after May 21, 1983, or who was under 18 years of age on that date may be included within the definition of a legitimate or legitimated "child" as set forth in section 101(b)(1) of the Act. We emphasize that our holding is retroactive only insofar as it applies to a child who was under 18 years of age on May 21, 1983. We note that when the New Jersey Parentage Act was enacted on May 21, 1983, the beneficiary was 16 years old. Thus, the act of eliminating all legal distinctions between legitimate and illegitimate children had occurred before the beneficiary had reached the age of 18 years. See Matter of Cortez, 16 I&N Dec. 289 (BIA 1977); Matter of Obando, 16 I&N Dec. 278 (BIA 1977). However, although the petitioner was clearly residing in New Jersey at the time he filed the visa petition in March of 1986, we are not satisfied from our review of the record that he has established his residence or domicile in New Jersey prior to the beneficiary's 18th birthday. Therefore, we will remand the record to the RAC director to determine whether the petitioner was a resident or domiciliary of New Jersey after May 21, 1983 (the date the New Jersey Parentage Act was enacted), but before June 1, 1984 (the date the beneficiary turned 18 years of age). Thereafter, the RAC director will enter a new decision based on the record. Accordingly, the record will be remanded for further proceedings.

ORDER: The record is remanded for further proceedings and the entry of a new decision.

3021

MATTER OF PRADIEU

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In Visa Petition Proceedings

A27078577

Decided by Board October 22, 1986

Where a spouse visa petition is filed in the New York District Office of the Immigration and Naturalization Service, it must be adjudicated in compliance with the procedures set forth under the final consent judgment entered in Stokes v. INS, No. 74 Civ. 1022 (S.D.N.Y. Nov. 10, 1976), regardless of whether the visa petition has been submitted individually or simultaneously filed with an application for adjustment of status.

ON BEHALF OF PETITIONER: George T. Chew, Esquire
401 Broadway, Suite 501
New York, New York 10013

BY: Milhollan, Chairman; Dunne, Morris, Vacca, and Heilman
Board Members

The United States citizen petitioner applied for immediate relative status for the beneficiary as her spouse under the provisions of section 201(b) of the Immigration and Nationality Act, 8 U.S.C. § 1151(b) (1982). In a decision dated January 24, 1985, the district director denied the petition. The petitioner has appealed. The appeal will be sustained and the record remanded for further proceedings.

The spouse visa petition, Form I-130 (Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa), was filed on the beneficiary's behalf on June 25, 1984, at the New York District Office of The Immigration and Naturalization Service. The petition was apparently accompanied by an application for adjustment of status. See 8 C.F.R. §§ 204.1(a)(2)(i), 245.2(a)(2) (1984). On January 24, 1985, the district director denied the petition. His decision indicates that a "245 interview" was conducted, that there was reason to doubt the validity of the marital relationship, and that the petitioner had "not provided evidence, either documentary or by testimony given at the time of [the] interview that this is a bona fide marital relationship." The record itself does not reflect when the "interview" was conducted, what occurred at the "interview," what documents, if any, were requested and not provided, why there was reason to doubt the validity of the marriage, or what specific facts supported the denial of the visa petition. The record predating the appeal includes only the visa petition, photocopies of a birth and a marriage certificate, and the district director's decision denying the petition.

On appeal the petitioner, through counsel, challenges the conduct of the interviewer, the substance of the district director's decision, including the failure to reference evidence submitted at the interview, 1/ and the Service's failure to comply with the procedures required under the final consent judgment entered in Stokes v. INS, No. 74 Civ. 1022 (S.D.N.Y. Nov. 10, 1976) ("the Stokes judgment").

The Service brief in opposition to the petitioner's appeal addresses the issue concerning the Stokes judgment but does not otherwise specifically address the issues raised by the petitioner on appeal.

As we agree with the petitioner that this petition cannot be denied without compliance with the provisions of the Stokes judgment, the decision of the district director will be vacated and the record remanded for further proceedings. Even were this not the case, however, the decision in issue here would be reversed as the specific basis for the denial of the petition, and the evidence underlying that decision, cannot be determined from either the decision itself or the record.

1/ On appeal the petitioner states that "evidence of a joint bank account, photographs from a wedding album, wedding and gift cards and testimony regarding their courtship and marriage" was presented. The record does not include this evidence.

Paragraph 49 of the Stokes judgment states that the provisions of the judgment apply to "I-130 spouse visa petitions . . . filed . . . in the New York District Office of the . . . Service." For the purposes of the judgment, an "adjudicatory proceeding" is defined to include "all interviews and examinations held before presiding immigration officers in connection with the determination of I-130 spouse visa petitions filed in the New York District Office." Included in the definition of "Presiding Immigration Officers" are "immigration inspectors, immigration examiners, or supervisory officers of such employees to whom the . . . Service delegates authority for performing functions . . . [relating to the adjudication of] I-130 spouse petitions." The Stokes judgment sets forth procedural requirements, which are not otherwise required by regulation, governing the investigation and adjudication of spouse visa petitions filed in the New York District Office. Paragraph 54 of the judgment provides that "[j]urisdiction is retained by the Court until further order, for the purpose of issuing any orders as may be necessary for the construction, implementation, or enforcement of this judgment or of any of the provisions thereof. . . ."

The Service contends that the Stokes judgment does not apply to this visa petition because it was filed simultaneously with an application for adjustment of status. It is submitted that the Stokes judgment is "solely a stipulation between the parties," 2/ that it makes no reference to "simultaneous filings, section 245 proceedings or I-485 interviews," and that the "present practice of the Service and the New York Office of providing merged petition/adjustment proceedings is manifestly dehors the terms agreed upon in the Stokes stipulation." It is argued that this "independent practice" established for the public benefit should not be disturbed because the Stokes judgment "expressly refrains from judging the validity of procedures in the New York District Office or the Immigration and Naturalization Service generally." It is finally noted that a petitioner may elect to file a visa petition,

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2/ It is not alleged that the final judgment is no longer in effect or does not otherwise bind the Service.

not accompanied by an adjustment application, and request an interview, "thereby assuring the petitioner of the rights and privileges under the Stokes judgment."

While we are not unsympathetic to the problems faced by the New York District Office in timely adjudicating visa petitions and are aware of the added difficulties the Stokes judgment may create, we cannot find that a spouse visa petition filed in the New York District Office is "dehors the terms agreed upon in the Stokes [judgment]" solely because it is accompanied by an application for adjustment of status. This simultaneous filing does not change the fact that a spouse visa petition is filed in the New York District Office and must be adjudicated as such. See 8 C.F.R. §§ 204.1(a)(2)(i), 245.2(a)(2)(1986). Accordingly, the petition comes within the specific terms of the Stokes judgment and cannot be denied without providing the petitioner her right to an "adjudicatory proceeding" under the provisions of the stipulation. The Service remains free to seek a construction of the judgment from the district court under the court's retained jurisdiction. This would have been the appropriate course at the outset to resolve whether the procedures in issue here could be found to be outside the scope of the judgment.

Accordingly, the appeal must be sustained and the record remanded for further proceedings consistent with this decision and the entry of a new decision.

ORDER: The appeal is sustained and the record is remanded for further proceedings and the entry of a new decision.

3022

MATTER OF GARCIA-GARROCHO

In Exclusion Proceedings

A-22772614

Decided by Board December 5, 1986

(1) Section 243(h)(2)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(2)(B) (1982), provides that withholding of deportation shall not apply to an alien who, having been convicted of a particularly serious crime, constitutes a danger to the community.

(2) A particularly serious crime is one that, by its nature, represents a danger to the community.

(3) Crimes that are inherently "particularly serious" satisfy, on their face, the requirements of the exclusionary bar under section 243(h)(2)(B) of the Act.

(4) A New York State conviction for residential burglary in the first degree is per se a "particularly serious" crime because the statute involves one or more aggravating circumstances including physical injury or potentially life threatening acts.

EXCLUDABLE: Act of 1952 - Sec. 212(a)(9) [8 U.S.C. § 1182(a)(9)]
Crime involving moral turpitude

Sec. 212(a)(20) [8 U.S.C. § 1182(a)(20)]
No valid immigrant visa

ON BEHALF OF APPLICANT:
Pro se

ON BEHALF OF SERVICE:
Steven R. Riemer
General Attorney

BY: Milhollan, Chairman; Dunne, Morris, Vacca, and Heilman, Board Members

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In a decision dated October 30, 1985, an immigration judge found the applicant excludable under sections 212(a)(9) and (20) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9) and (20) (1982), denied his renewed requests for asylum and withholding of deportation under sections 208(a) and 243(h) of the Act, 8 U.S.C. §§ 1158(a) and 1253(h) (1982), and ordered him excluded and deported from the United States. The applicant has appealed. The appeal will be dismissed.

The applicant is a 29-year-old native and citizen of Cuba who arrived at Key West, Florida, on May 15, 1980, and was subsequently paroled into the United States. At his exclusion hearing, begun on October 4, 1985, and completed on October 30, 1985, the applicant was advised of the nature of the proceedings, his right to be represented by counsel, the availability of free legal services, and his right to request a continuance of the hearing to afford him the opportunity to obtain counsel. The hearing was continued until October 30, 1985, for this purpose. The applicant again appeared without counsel and the proceedings were completed. We are satisfied that the applicant was afforded his right to obtain counsel and that his exclusion hearing was fair. See Ramirez v. INS, 550 F.2d 560 (9th Cir. 1977); Matter of Santos, Interim Decision 2969 (BIA 1984); Matter of Gutierrez, 16 I&N Dec. 226 (BIA 1977).

We further find that the immigration judge properly concluded from the applicant's admissions that he was an intending immigrant without the required documents and was therefore excludable under section 212(a)(20) of the Act. See Matter of Castellon, 17 I&N Dec. 616 (BIA 1981). We are also satisfied that the record establishes the applicant's excludability under section 212(a)(9) of the Act since it contains a certified true copy of a conviction record which reflects that the applicant was convicted on a plea of guilty in the State of New York on June 17, 1981, of burglary in the first degree and was sentenced to prison for an indeterminate period of 4 to 12 years. See Matter of Leyva, 16 I&N Dec. 118 (BIA 1977).

The applicant renewed his requests for asylum and withholding of deportation during his hearing. His Request for Asylum in the United States (Form I-589) was supported by a copy of the form motion to reopen discussed in our decision in Matter of Rodriguez-Coto, Interim Decision 2985 (BIA 1985). The applicant claimed that he would be imprisoned or killed if returned to Cuba because of his departure from Cuba and his refusal to serve in the Cuban army in either Angola or Ethiopia. The immigration judge denied the applicant's requests for asylum and withholding of deportation, concluding that he had failed to establish a well-founded fear of persecution if returned to Cuba and that he was not eligible for withholding of deportation and did not warrant asylum in the exercise of discretion on the basis of his conviction for burglary in the first degree, which the immigration judge considered to be a "particularly serious crime" under section 243(h)(2)(B) of the Act.

Section 243(h)(2)(B) provides in pertinent part that withholding of deportation shall not apply to any alien if the Attorney General determines that "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." We have previously held that the statutory exclusionary clause for a "particularly serious crime" relates only to the nature of the crime itself and that it does not vary with the nature of the evidence of persecution. Id. The exclusionary clause for a "particularly serious crime" represents Congress' view that an alien who has been convicted of such a crime constitutes a danger to the community of the United States and is unworthy and undeserving of protection, notwithstanding the possible validity of his persecution claim. See Matter of Carballe, Interim Decision 3007 (BIA 1986).

The determination of whether a conviction is for a "particularly serious crime" essentially turns on whether the crime is one that, by its nature, represents a danger to the community. We have recognized that certain crimes are inherently "particularly serious" and on their face satisfy the requirements of the exclusionary bar embodied in section 243(h)(2)(B) of the Act. See id.; Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982). Such crimes are per se "particularly serious," requiring no further inquiry into the nature and circumstances of the underlying conviction.

The applicant before us was convicted of burglary in the first degree in violation of section 140.30 of New York Penal Law. This section provides as follows:

> A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling with intent to commit a crime therein, and when, in effecting entry or while in the dwelling or in immediate flight therefrom, he or another participant in the crime:
>
> 1. Is armed with explosives or a deadly weapon; or
>
> 2. Causes physical injury to any person who is not a participant in the crime; or
>
> 3. Uses or threatens the immediate use of a dangerous instrument; or
>
> 4. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun, or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, burglary in the second degree, burglary in the third degree or any other crime.
>
> Burglary in the first degree is a Class B felony.

N.Y. Penal Law § 140.30 (McKinney 1981).

In recognition of the seriousness of this crime and its inherent potential for great bodily harm to the victims, this section provides that burglary in the first degree is limited to residential burglary involving one or more of the enumerated aggravating circumstances. We note in this regard that burglary of a building, as distinguished from a dwelling, involving one or more of the enumerated aggravating circumstances, constitutes burglary in the second degree. N.Y. Penal Law § 140.25 (McKinney 1981). Burglary in the third degree involves a building without any aggravating circumstances. N.Y. Penal Law § 140.20 (McKinney 1965).

We find that the applicant's conviction for burglary in the first degree is within the category of crimes that are per se "particularly serious." Under section 140.30 of New York Penal Law, the applicant's conviction required a finding that he accomplished his crime by one or more of the enumerated aggravating circumstances, all of which involve physical injury or potentially life-threatening acts. The crime for which the applicant was convicted clearly demonstrates his propensity for violent, anti-social behavior and total disregard for the inherent potential risk of extreme violence and physical harm to others. On its face, this crime is "particularly serious." We conclude, as did the immigration judge, that the applicant is statutorily ineligible for withholding of deportation based on his conviction for burglary in the first degree and that he does not warrant asylum in the exercise of discretion. We are satisfied that his 1981 conviction was for a "particularly serious crime," representing criminal behavior "which constitutes a danger to the community of the United States." See section 243(h)(2)(B) of the Act; 8 C.F.R. § 208(f)(1)(iv) (1985); Matter of Carballe, supra; Matter of Frentescu, supra.

Moreover, even if the applicant were not statutorily ineligible for withholding of deportation under the provisions of section 243(h)(2)(B) of the Act as the result of his conviction for a "particularly serious crime," we conclude on the basis of the considerations discussed in Matter of Leon-Orosco and Rodriguez-Colas, Interim Decision 2974 (BIA 1983; A.G. 1984), that the applicant has not otherwise shown that his persecution claim, based on his departure from Cuba and his refusal to serve in the

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military in Angola and Ethiopia, is well founded. The applicant has presented no objective evidence which demonstrates that he, as an individual, would be singled out and targeted for persecution. _See_ _INS_ v. _Stevic_, 467 U.S. 407 (1984); _Rejaie_ v. _INS_, 691 F.2d 139 (3d Cir. 1982); _Moghanian_ v. _United States Department of Justice_, 577 F.2d 141 (9th Cir. 1978); _Matter of Acosta_, Interim Decision 2986 (BIA 1985). There is no evidence which suggests that the applicant was ever persecuted or that the likelihood exists that he will be persecuted if returned to Cuba.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

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MATTER OF ATEMBE

In Visa Petition Proceedings

A-28369181

Decided by Board December 29, 1986

Notwithstanding the fact that an illegitimate child may qualify for immigration purposes as the "child" of his or her natural father following the amendment on November 6, 1986, of section 101(b)(1)(D) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(D) (1982), provided paternity is established and the father "has or had a bona fide parent-child relationship" with the child, a visa petition filed prior to the effective date of the amendment may not be used to obtain preference status for the beneficiary under section 203(a) of the Act, 8 U.S.C. § 1153(a) (1982), because approval of the visa petition would give the beneficiary a priority date to which he or she was not entitled at the time the visa petition was filed. Matter of Drigo, 18 I&N Dec. 223 (BIA 1982), and Matter of Bardouille, 18 I&N Dec. 114 (BIA 1981), followed.

ON BEHALF OF PETITIONER:
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ON BEHALF OF SERVICE:
Steven R. Abrams
General Attorney

BY: Milhollan, Chairman; Dunne, Morris, Vacca, and Heilman, Board Members

In a decision dated August 22, 1986, the Immigration and Naturalization Service Regional Adjudications Center (RAC) director denied the visa petition filed by the petitioner to accord the beneficiary preference status as his unmarried son pursuant to section 203(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(a)(2) (1982). The petitioner has appealed from that decision. The appeal will be dismissed.

The petitioner is a native of Cameroon and lawful permanent resident of the United States. The record reflects that the beneficiary was born in Cameroon of a relationship between the petitioner and a woman who was not then, and never became, his wife.

To qualify as a "son" under the provisions of section 203(a)(2) of the Act, the beneficiary must qualify, or once have qualified, as the petitioner's "child" as that term is defined by section 101(b)(1) of the Act, 8 U.S.C. § 1101(b)(1) (1982). Section 101(b)(1) provides in part:

> The term "child" means an unmarried person under twenty-one years of age who is —
>
> (A) a legitimate child; or
>
> . . .
>
> (C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation . . . .

The term "legitimate" applies only to children born in wedlock or to children born out of wedlock within jurisdictions that have eliminated all distinctions between legitimacy and illegitimacy. See generally Matter of Reyes, 17 I&N Dec. 512 (BIA 1980), and the cases cited therein. The term "legitimated" refers to the act of putting, by legal means, an illegitimate child in the position or state of a legitimate child in the eyes of the law. Where less than equality of status results, an act of legitimation is not deemed to have occurred. Id.

The RAC director found that the petitioner had failed to establish that the beneficiary was legitimate at birth or that he had been legitimated under the law of Cameroon or the law of New York, the petitioner's and beneficiary's present place of residence. We agree with the RAC director's findings.

The petitioner does not claim that the beneficiary qualifies as his "legitimate" son and there has been no showing that compliance with the provision of Cameroon law relied upon by the petitioner 1/ accords a child born out of wedlock the full legal status of a legitimate child so that the child may be considered to have been "legitimated" for purposes of the immigration laws. Under the law of New York, legitimation can only be effected by the marriage of the child's natural parents. See Matter of Hernandez, Interim Decision 2953 (BIA 1983).

On November 6, 1986, subsequent to the RAC director's decision in the instant case, the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, ____ Stat. ____, was signed into law. That legislation amended section 101(b)(1)(D) of the Act to recognize for immigration purposes the relationship of an illegitimate child to his or her natural father, as well as to his or her mother, 2/ provided paternity is established and the father "has or had a bona fide parent-child relationship" with the child.

Although the beneficiary may presently be entitled to classification as the child of the petitioner by reason of section 101(b)(1)(D) of the Act, as amended, the petitioner may not use the visa petition presently under consideration to obtain a benefit under the new provision. This Board has held that in order to be eligible for preference status under section 203(a) of the Act, the beneficiary must be fully qualified for such classification at the time the visa petition is filed to avoid giving the beneficiary a priority date to which he or she was not entitled

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1/ Part V, Chapter 1, Article 44 of the Official Gazette of the United Republic of Cameroon.

2/ Prior to its amendment, section 101(b)(1)(D) of the Act included within the definition of the term "child":

> an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother.

at the time of filing. *See* *Matter of Drigo*, 18 I&N Dec. 223 (BIA 1982); *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981). The petitioner may, of course, file a new visa petition on the beneficiary's behalf accompanied by proof of paternity and the existence of a "bona fide parent-child relationship." The appeal will be dismissed.

ORDER: The appeal is dismissed.

Chairman